UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

Stephen, Henry John

MR. SERJEANT STEPHEN'S

New Commentaries

ON THE

LAWS OF ENGLAND

(PARTLY FOUNDED ON BLACKSTONE).

BY

HIS HONOUR JUDGE STEPHEN.

"*For hoping well to deliver myself from mistaking, by the order and perspicuous expressing of that I do propound, I am otherwise zealous and affectionate to recede as little from antiquity, either in terms or opinions, as may stand with truth, and the proficience of knowledge.*"—Lord Bac. Adv. of Learning.

The Thirteenth Edition

BY

ARCHIBALD BROWN,

Of the Middle Temple, Esq.; Barrister-at-Law.

THOROUGHLY REVISED AND MODERNISED,
AND
BROUGHT DOWN TO THE PRESENT TIME.

IN FOUR VOLUMES.

VOL. I.

LONDON:
BUTTERWORTH & CO., 7, FLEET STREET, E.C.
Law Publishers.
DUBLIN: HODGES, FIGGIS & CO., GRAFTON STREET.
CALCUTTA: THACKER, SPINK & CO. MELBOURNE: G. PARTRIDGE & CO.
MANCHESTER: MEREDITH, RAY & LITTLER.
EDINBURGH: T. & T. CLARK; BELL & BRADFUTE.
1899.

T
St434n
1899

LONDON:
PRINTED BY SHAW AND SONS, FETTER LANE AND CRANE COURT, E.C.

RLK 24 November 53

PREFACE TO THE ORIGINAL EDITION

(Abridged).

Of the plan and principle of this work on the Laws of England, it may be right here to give some explanation. Though the celebrated Treatise of Blackstone still remains without a rival, the positions which it contains have been so trenched upon by modern alterations in the law, that if the student were to rely upon it, as containing an accurate account of our present system of jurisprudence, he would be sadly led astray. . . . But still the unimpaired portions of that Treatise comprise many passages, which (free in other respects from objection) are distinguished by all that grace of diction, justness of thought, and affluence of learning, to which the original author owed his fame; and any new Commentator on the Laws cannot hope to rival these excellences; and to displace or sacrifice them for original matter of his own, would be to do a serious injury to the public, and even to the law itself.

All passages, then, which appeared to me to fall under the above description I have retained; my deviations, nevertheless, have been frequent

791846

and extensive; and it is seldom that I have been able to pursue the original text for several pages in succession, without the introduction of new matter from my own pen.

With respect to the general arrangement of the work, it is to be remarked that the order adopted by Blackstone is, in all its principal lineaments, derived from the Analysis of Hale; but though rendered venerable by the combined authority of names like these, I have not felt myself able to accede to it without one important alteration. The main division, indeed, by which the body of municipal law is severed into *Rights* and *Wrongs*, I have deemed it expedient to retain: for that division is founded on a natural and just distinction, and is interwoven in the whole fabric of our law; and the division also of Wrongs into those of a *civil* and those of a *criminal* nature, I have, for similar reasons, thought it incumbent on me to preserve. But as to the division of *Rights*, the distribution of these by Blackstone into *Rights of Persons* and *Rights of Things*, is an arrangement which is contrary to both grammatical and logical propriety. For the rights of things can only be understood as signifying the rights *relating* to things—a sense not correctly conveyed by the form of expression; and are placed, besides, in false antithesis to the rights of persons,—by which is evidently intended the rights *belonging* to persons. The arrangement in question is open,

moreover, to other objections of a weightier description. For it determines that the law relating to *persons* shall be fully discussed before that relating to *property* has been examined,—and yet the subject of property ought, in reason, to take the precedence of at least that part of the law of persons which treats of relative rights (*a*). And another grave objection to the arrangement in question is, that it fails to embrace (or to duly embrace) the whole compass of rights; and it leaves, in fact, out of consideration, or gives but an awkward and incongruous place for the consideration of, a great and increasingly important branch of the law—that, namely, which concerns the social, as distinguished from the political, institutions of the country: *e.g.*, the laws relating to the poor and to highways are treated by Blackstone, under the pressure of this faulty arrangement, as mere incidents respectively to the offices of parish overseer and of parish surveyor.

(*a*) This did not escape the discernment of Hale: "Having done "with the rights of persons, I now come to the rights of things. And "though, according to the usual method of civilians and our antient "common law tractates, this comes in the second place, after the *jura* "*personarum*, and therefore I have herein pursued the same course, "yet that must not be the method of a young student of the common "law, but he must begin his study here, at the *jura rerum*; for the "former part contains matter proper for the study of one that is "well acquainted with those *jura rerum*." Hale's Anal. sect. 23. This passage had not attracted my attention until my principle of division had been fixed upon; and its subsequent discovery was of course calculated to give me increased confidence in the propriety of my choice.

Dissatisfied for these reasons with Blackstone's arrangement of rights, and conceiving that it had not become so inveterate among us as to render its retention unavoidable, I have ventured to lay it aside, and to adopt a different plan of distribution; which plan will be found stated at the commencement of Book I. of these Commentaries, its leading principle being to make the distinction between *Persons* and *Things* the foundation not of a primary, but of a subordinate arrangement, and to consider *Persons* as constituting the only primary objects of the law's regard.

But the persons, whom the law is supposed thus uniformly to contemplate, are presented, first, in the light of insulated individuals,—and in that capacity their *personal* (in other words their *bodily*) rights are examined; next, in their connection with the things around them,—which introduces the consideration of their rights of *property*; next, as members of families,—which involves their *rights in private relations*; and lastly, as members of the community,—which leads to the discussion of their rights in public relations, or (as they may be termed more compendiously) *public rights*. And, according to this order, the absolute right uniformly takes the precedence of the relative; the law of property in general is investigated before the relations of men, in regard to property, arise for consideration; and the consideration of *Public Rights* is conveniently

sub-divided into those, on the one hand, which concern a man in his relations to persons in authority,—whether civil or ecclesiastical; and into those, on the other hand, which concern him in his relations to his fellow citizens; and the entire plan of the Treatise may accordingly be synoptically exhibited as follows :—

I. Of Personal Rights.

II. Of Rights of Property.
   1. As to things real.
   2. As to things personal.

III. Of Rights in Private Relations.
   1. Between master and servant.
   2. Between husband and wife.
   3. Between parent and child.
   4. Between guardian and ward.

IV. Of Public Rights.
   1. As to the civil government.
   2. As to the church.
   3. As to the social economy of the realm.

V. Of Civil Injuries.
   Including the modes of redress.

VI. Of Crimes.
   Including the modes of prosecution.

PREFACE

TO THE

THIRTEENTH EDITION.

In editing this Thirteenth Edition of "Stephen's Blackstone," I have endeavoured to reconcile the requirements of law students with the maintenance of the Treatise as a work of literary excellence. The characteristics of the present age are, however, very different from those of the Blackstone period; and neither the methods of that learned author and judge nor his elegancies of expression are sufficiently direct and severe (or concise) to satisfy either the wants or the tastes of these modern times. Consequently, much condensation in parts, and many other alterations both of language and of treatment, have been necessary.

In Vol. I., besides incorporating other amendments (and changes) in the law of Real Property and of Conveyancing, I have incorporated the provisions of the Land Transfer Act, 1897; and have, in fact, attempted a detailed exposition of these provisions, which (the measure being already in part compulsory) are likely now to be

more widely in use than the like provisions of the Land Transfer Act, 1875, ever were.

In Vol. II., I have more fully treated of the essentials of a contract, and have endeavoured also a plain exposition of the provisions of the Workmen's Compensation Act, 1897; and (in treating of the law relating to the Church) I have not overlooked the Benefices Act, 1898; and I have made numerous other minor alterations and amendments in that volume.

In Vol. III., I have almost entirely re-written the chapters relating to Civil Injuries and to the Remedies therefor by action, including (in particular) the "Proceedings in an Action" in the Queen's Bench Division; and I believe that the imperfections which in former editions affected this part of Stephen's have now been remedied; and I have also added a full explanation of the procedure on "Originating Summons" in the Chancery Division.

If it should still be objected to this part of Stephen's, that the retention in it of the old distinctions among legal actions is an archaism, I can only urge (in my justification) that the distinctions themselves are so very serviceable in actual business,—as the judgments of the Common Law Judges still occasionally show,—that I felt it would be a pitiful mistake to leave them out; and we may, in fact, yearly anticipate their modified revival.

In Vol. IV., there has been, comparatively speaking, little to modify or alter, save so far as the Criminal Evidence Act, 1898, has necessitated modifications and alterations, and I have given a very simple (but, I hope, a sufficiently full and complete) exposition of the provisions of that Act, and of its interpretation by the Courts up to the date of publication.

And I may say, generally, that as regards certain specific matters, such as the Poor Laws and Highways, Libel and Slander, the Admiralty Jurisdiction of the County Courts, and the Practice and Procedure in a Probate Action and on a Divorce Petition, I am indebted for assistance to certain gentlemen of the Bar peculiarly versed in and acquainted with these matters, so that these specific subjects have additional authority in their treatment. And I may add, in conclusion, that the criticisms which the Twelfth Edition (also edited by me) has received from various gentlemen and bodies (occupied with, or more or less interested in, legal education) have all been duly weighed, and their suggestions have been carried out.

A. BROWN.

8, New Square,
Lincoln's Inn, W.C.
June, 1899.

CONTENTS OF THE WORK.

VOLUME I.

Introduction.

PAGE

SECT. I.—Of the Study of the Law 1
II.—Of the Nature of Laws in general 10
III.—Of the Laws of England 16
IV.—Of the Countries subject to the Laws of England ... 50
V.—Of the Kingdom of England itself 79

Book I.

OF PERSONAL RIGHTS.

Of Rights and Wrongs 95
Of the Right of Personal Security 96
Of the Right of Personal Liberty 100

Book II.

OF RIGHTS OF PROPERTY.

As to Property in general 105

PART I.

PAGE
OF THINGS REAL 109

CHAP. I.

Of the Divisions of Things Real.

Of Lands, Tenements, and Hereditaments 110
Of Hereditaments, Corporeal or Incorporeal 112

CHAP. II.

Of Tenures.

Of the Feudal System 113
Of the Introduction of that System into England 119
Of the Nature of Tenure 121
Of the different sorts of Tenure 123
Of Knight's Service 124
Of Free Socage and its Incidents 133
Of Petit Serjeanty, Tenure in Burgage, and Gavelkind 137
Of Copyhold 139
Of Antient Demesne 146
Of Customary Freehold 148
Of Tenure in Frankalmoign 149

CHAP. III.

Of Freehold Estates of Inheritance.

Of Estate 151
Of Legal and Equitable Estate 152
Of a Fee 153
Of Estates in Fee Simple 154
Of Fee Simple Absolute, Base, and Conditional 158
Of Estates Tail 160
Of *Taltarum's Case* 165

CHAP. IV.

Of Freehold Estates not of Inheritance.

PAGE
Of Estates for Life, Conventional and Legal 168
Of Estovers, Waste, and Emblements 169
Of Apportionment 173
Of Tenant in Tail after Possibility of Issue Extinct 174
Of Tenant by the Curtesy of England 175
Of Dower 178
Of Jointure 182

CHAP. V.

Of Estates less than Freehold.

Of the Distinction between Chattel and Freehold 187
Of Estates for Years 188
Of *Interesse Termini* 193
Of Tenancies from Year to Year 194
Of Estates at Will 196
Of Estates at Sufferance 198
Of Emblements 199
Of Fixtures 201
Of Tenant Right and Tenant's Compensation 205
Of Title Deeds 207
Of Heirlooms 208
Of Animals *Feræ Naturæ* 209
Of Shares in Public Undertakings 210

CHAP. VI.

Of Estates upon Condition.

Of Estates on Condition Implied 211
Of Estates on Condition Express 212
Of Conditional Limitation 212
Of the Right of Entry on Breach of Condition subsequent ... 214
Of Conditions Impossible, Illegal, and Repugnant 215
Of Waiver of Forfeiture 216
Of *Vivum Vadium*, and of *Mortuum Vadium* 217
Of Mortgage 217
Of Estates by Statute Merchant and Statute Staple 221
Of Estate by Elegit 222
Of Devises to Executors to pay Debts 223

CHAP. VII.

Of Estates in Possession, Reversion, and Remainder.

PAGE
Of an Estate in Possession 225
Of Right of Possession and Right of Entry 225
Of an Estate in Reversion 226
Of Merger 228
Of an Estate in Remainder 229
Of the Rules as to the Creation of Remainders 232
Of Vested and Contingent Remainders 234
Of the Rules relative to Contingent Remainders 236
Of Defeating Contingent Remainders 238
Of Trustees to preserve Contingent Remainders 239
Of the Rule in *Shelley's Case* 240
Of the Production of *Cestui que vie* 241
Of the Sale of Reversionary Interests... 242
Of Remainders and Reversions defeated by Sale of Tenant for Life 242

CHAP. VIII.

Of Estates in Severalty, Joint Tenancy, Coparcenary, and Common.

Of an Estate in Severalty 243
Of an Estate in Joint Tenancy 243
Of an Estate in Coparcenary 250
Of Tenancy in Common 254
Of Cross Remainders 257

CHAP. IX.

Of Uses and Trusts.

Of the Origin of Uses and Trusts 258
Of the Doctrine of Uses prior to the Statute of Uses 260
Of the Statute of Uses 264
Of the Doctrine of Uses and Trusts since the Statute 267
Of the different kinds of Trusts 269
Of the Estate of the Trustee 270
Of the Estate of *Cestui que trust* 272
Of modern Statutes as to Trust Estates 274

CHAP. X.

Of Title in General.

PAGE
Of Title 276
Of Title by Act of Law, or by Purchase 277

CHAP. XI.

Of Title by Descent.

Of the Nature of the Heir's Title in general... 278
Of the Inheritance Act, 3 & 4 Will. 4, c. 106 279
Of tracing Descent from the Purchaser 280
Of the Maxim *Seisina facit Stipitem* 285
Of Descent to the Issue 287
Of the Preference of Males to Females 287
Of Primogeniture... 287
Of the Representation of Children 288
Of the Descent to Lineal Ancestors 290
Of the Preference of the Paternal Line to the Maternal ... 291
Of the Descent to the Issue of Lineal Ancestors 292
Of Whole and Half Blood 293
Of certain Special Cases of Descent 295
Of the Mode of tracing and ascertaining the Heir 296
Of Entry by the Heir 297
Of Breaking the Descent 298
Of the Liability of the Heir for the Debts of the Ancestor ... 298
Of the Payment of Debts under the Land Transfer Act, 1897 301

CHAP. XII.

Of Title by Escheat.

Of the Nature and Principle of Escheat in general... 302
Of Escheats *propter Defectum Sanguinis* 303
Of Monsters 303
Of Bastards 304
Of Aliens taking by Descent 305
Of Escheats *propter Delictum Tenentis* 306
Of Attainder 306
Of Corruption of Blood 307
Of Forfeiture in case of Trust and Mortgage Estates 309
Of the Remission of Forfeitures 310

CHAP. XIII.

Of Title by Occupancy.

PAGE
Of the Nature of the Title by Occupancy 311
Of its Application 311
Of Adverse Possession 311
Of Common and Special Occupancy 312
Of Alluvion and Dereliction 314
Of Boundary Rivers 315

CHAP. XIV.

Of Title by Forfeiture.

Of Alienation in Mortmain 316
Of Gifts to Charitable Uses... 320
Of Alienation by particular Tenants 324
Of Disclaimer 325

CHAP. XV.

Of Title by Alienation in General.

Of the Antient Law as to Alienation 327
Of the Present Law on the subject 328
Of the Capacity to Aliene 331
Of Alienation by Persons attainted 331
Of Alienation by Corporations 332
Of Alienation by Idiots and Lunatics 333
Of Alienation by Infants 333
Of Alienation by Married Women... 334
Of Alienation by Aliens 335
Of the Disclaimer (Partial or Total) of the Alienee 335

CHAP. XVI.

Of Deeds.

Of the Nature of Deeds 337
Of Indentures and of Deeds-poll 338
Of the Requisites of Deeds 339
Of the Premises 340

CHAP. XVI.—(*continued.*) PAGE
Of the *Habendum* and *Tenendum* 341
Of the *Reddendum* 342
Of Conditions 342
Of Warranty 343
Of Covenants 344
Of the Conclusion and Date 345
Of Reading the Deed 346
Of Sealing 346
Of Signing 347
Of Delivery 347
Of the Attestation 348
Of the Avoidance of Deeds 349
Of the Consideration 350
Of Voluntary Conveyances 350
Of the Construction of Deeds 351

CHAP. XVII.

Of Ordinary Conveyances—and, First, of those at the Common Law.

Of the different kinds of Conveyances 354
Of the Feoffment 354
Of Livery in Deed, and in Law 355
Of the Tortious Feoffment 355
Of the Grant 358
Of the Lease 359
Of Agreements to Let 360
Of Covenants running with the Land 361
Of the Exchange 362
Of the Partition 363
Of the Release 364
Of the Confirmation 367
Of the Surrender 368
Of the Assignment 370
Of the Defeasance 372
Of the Lease and Release 372

CHAP. XVIII.

Of Conveyances under the Statute of Uses.

Of the Principle of a Conveyance under the Statute of Uses ... 374
Of the Feoffment to Uses 374
Of the Covenant to stand Seised to Uses 375

CHAP. XVIII.—(*continued.*) PAGE
Of the Bargain and Sale 375
Of the Lease and Release 378
Of the Grant to Uses 379
Of Limitations to Uses in general 380
Of Uses *in Futuro* 383
Of Powers, and of Estates Executed and Executory 385
Of Innocent Conveyances 388
Of Perpetuities 389
Of Accumulations 390

CHAP. XIX.

Of Conveyances by Tenants in Tail and Married Women.

Of the Fine and Recovery 392
Of Fines 393
Of Recoveries 397
Of Deeds to Lead and to Declare Uses 400
Of Disentailing Deeds 401
Of Deeds Acknowledged 407

CHAP. XX.

Of the Conveyance by Devise.

Of Devises generally 409
Of the Power of Devising 410
Of the Solemnities required 412
Of the Construction of Devises 417
Of the Operation of Devises in Conveying Real Estate 425

CHAP. XXI.

Of Extraordinary Conveyances,—or those by Matter of Record.

Of Private Acts of Parliament 428
Of Royal Grants 430
Of the Construction of the Royal Grant 432

CHAP. XXII.

Of Copyholds.

PAGE
Of the Nature of Copyholds in general 435
Of Estovers and Waste 437
Of Quit Rents 438
Of Fines 438
Of Heriots 439
Of the Liability of Copyholds to Debts 440
Of the Enfranchisement of Copyholds 441
Of the Alienation of Copyholds 441
Of Surrender 442
Of Admittance 444
Of Devises of Copyholds 445
Of the Conveyance of Copyhold Estates Tail 449
Of the Conveyance of Copyholds by Married Women 449
Of the Conveyance of Equitable Estates in Copyholds ... 450
Of the Copyhold Act, 1894 450

CHAP. XXIII.

Of Incorporeal Hereditaments, called also Purely Incorporeal Hereditaments.

Of Incorporeal Hereditaments in general 456
Of Commons 457
Of Ways, and of Watercourses 465
Of Lights 467
Of Franchises 468
Of Rents 476
Of the Incidents generally of Incorporeal Hereditaments 484
Of Prescription 487
Of Prescription at Common Law 488
Of Prescription under 2 & 3 Will. 4, c. 71 491
Of the Extinction of Incorporeal Hereditaments 494
Of the Abandonment of Lights and Watercourses 495

CHAP. XXIV.

Of the Conveyancing and Land Acts, 1881—1892, and other Acts.

Of the Conveyancing Acts, 1881 to 1892 497
Of the Settled Land Acts, 1882 to 1890 516
Of the Settled Estates Act, 1877 539

CHAP. XXV.

Of Registration of Title to Land.

PAGE
Of Registration generally 542
Of the Land Registry 543
Of the Lands Charges, &c. Act, 1888 544
Of the Land Transfer Acts, 1875 and 1897 546
Of Official Certificates of Searches 559
Of the Declaration of Title Act, 1862 560

CHAP. XXVI.

Of the Death Duties on Land.

Of the Succession Duty 563
Of the Estate Duty 568
Of the Settlement Estate Duty 574

INDEX ... ... 577—622

VOLUME II.

Book II.

OF RIGHTS OF PROPERTY—continued.

PART II.

OF THINGS PERSONAL.

CHAP. I.

OF THINGS PERSONAL IN GENERAL AND OF PROPERTY THEREIN.

	PAGE
Of Chattels Personal	1
Of Moveables	2
Of Animals *Feræ Naturæ*	3
Of Absolute and Qualified Property	6
Of Property in Possession and in Action	8
Of Interests by way of Remainder in Chattels Personal ...	9
Of Joint Tenancy and Tenancy in Common in Chattels Personal ...	10
Of Equitable Interests in Chattels Personal	11

CHAP. II.

OF TITLE TO THINGS PERSONAL; AND, FIRST, OF TITLE BY OCCUPANCY.

Of Title by Occupancy	12
Of Hostile Capture	13
Of the Law relating to Game	14
Of Title by Accession	18
Of Title by Confusion or Intermixture	19

CHAP. III.

Of Title by Invention.

PAGE
Of Patent Rights 21
Of Copyright 31
Of Trade Marks and Trade Names 39
Of Designs... 42

CHAP. IV.

Of Title by Gift and by Assignment.

Of the Alienability of Personal Property 45
Of the Transfer of Choses in Action 46
Of a Gift 47
Of *Donatio Mortis Causâ* 48
Of Assignment, or Bargain and Sale 49
Of Fraudulent Gifts and Assignments 50
Of the Transfer of Coin and Negotiable Instruments 52
Of Forged Transfers 53

CHAP. V.—SECTION I.

Of Title by Contract, generally.

Of Promises 54
Of Specialty and Simple Contracts 54
Of the Requisites (General and Particular) to a Simple Contract 54
Of Contracts written and verbal, and of the Statute of Frauds ... 55
Of the *Assensus ad Idem* 55
Of Contracts express and implied 56
Of Contracts executed and executory 57
Of the Consideration, according as executed, executory, or continuing 57
Of Illegal and Immoral Considerations 60
Of Privity of Contract 61
Of the Construction or Interpretation of Contracts 62
Of the Performance of Contracts 62
Of Conditions Precedent 63
Of Contracts by Agents (general and special) 64

CHAP. V.—SECTION II.

Of the Contract of Sale.

PAGE
Of the Agreement itself 68
Of the Transmutation of the Property 68
Of the Right to the Possession 70
Of Contracts of Sale required to be in writing 70
Of Stoppage *in Transitu* 72
Of Sales in Market Overt 73
Of the Sale of Stolen Goods 74
Of Implied Warranties on Sales 75
Of the Maxim *Caveat Emptor* 76
Of Express Warranties on Sales 76
Of Factors and Brokers 77

CHAP. V.—SECTION III.

Of the Contract of Bailment.

Of the Varieties of Bailment 81
Of the Special Property of the Bailee 83
Of Common Innkeepers 84
Of Common Carriers... 86
Of Railway Companies as Carriers 88
Of Carriers by Sea 89

CHAP. V.—SECTION IV.

Of the Contract of Loan.

Of Usury 91
Of Bottomry 92
Of Respondentia 93
Of Maritime Loans 93
Of Annuities for Lives 94
Of Interest 95

CHAP. V.—SECTION V.

Of the Contract of Partnership.

PAGE
Of Trading Associations 97
Of the Constitution of a Partnership 97
Of the Dissolution of a Partnership 98
Of the Powers of each Partner 98
Of Ostensible and Dormant Partners 99
Of Lenders who are not Partners 100
Of the Winding up of the Partnership 102

CHAP. V.—SECTION VI.

Of the Contract of Guarantee (or of Suretyship).

Of the Requisite of Writing 103
Of *Uberrima Fides* 104
Of the Discharge of the Surety 105
Of Reimbursement and Contribution 105

CHAP. V.—SECTION VII.

Of Bonds.

Of the Varieties of Bonds 107
Of Impossible and Illegal Conditions 108
Of the Recovery of the Penalty 109
Of Contracts Secured by Penalties 110
Of Liquidated Damages 111

CHAP. V.—SECTION VIII.

Of Bills of Exchange and Promissory Notes.

Of the Varieties of Bills 112
Of Indorsements 113
Of Crossed Cheques 114
Of Presentation for Acceptance 115
Of the Refusal of Acceptance 118
Of the Protest 119
Of Promissory Notes 121
Of Negotiability 122
Of the Consideration 124
Of Alterations in Bill or Note 124

CHAP. V.- SECTION IX.

Of Policies of Life and Fire Insurance, and of Marine Insurance.

PAGE
Of the Contract itself 126
Of Marine Insurance... 127
Of Re-assurance and Double Insurance 128
Of Indemnity and Contribution 129
Of Deviations, &c. 130
Of Partial and Total Losses 131
Of Salvage, and of Average 132
Of Fire and Life Insurances 133
Of Wagering Policies 134
Of Accident Policies... 136
Of *Uberrima Fides* 136
Of Refunding Premiums 137

CHAP. V.—SECTION X.

Of Charter-Parties.

Of the Contract itself 138
Of Demurrage... 139
Of Freight *pro ratâ itineris* 140

CHAP. V.—SECTION XI.

Of Debts.

Of the Varieties of Debts 141
Of Debts apart from Contract 142

CHAP. VI.

Of Title by Bankruptcy.

Of the History of the Bankrupt Law 143
Of the Persons who may become Bankrupt 146
Of the Circumstances under which, and of the Manner in which, a Man may be adjudicated a Bankrupt 149
Of the Effect of the Bankruptcy on the Property of the Bankrupt 154
Of the Proceedings subsequent to Adjudication 165
Of Composition and Schemes of Arrangement 177

CHAP. VII.

Of Title by Will and by Administration.

	PAGE
Of acquiring Personal Estate by Will, and by Administration	183
Of the original State of the Law as to bequeathing Personalty ...	184
Of the present Power of bequeathing Personalty	185
Of the Ecclesiastical Jurisdiction over Wills and Administrations	186
Of the Capacity to be a Testator	188
Of the Solemnities of Wills	191
Of the Appointment of an Executor	192
Of Probate	193
Of the Grant of Administration	195
Of Administration *cum testamento annexo*	198
Of Administration *durante minore ætate*, *durante absentiâ*, and *pendente lite*	199
Of Administration *de bonis non*	200
Of limited or special Administrations	200
Of the Representative Character of Executors and Administrators	201
Of an Executor *de son tort*	202
Of the Duties of Executors and Administrators...	203
Of proving the Will	203
Of paying the Estate Duty	204
Of making Inventory and collecting the Assets	204
Of Payment of the Debts	205
Of the Protection of the Executor	206
Of Legacies	207
Of the Abatement and Ademption of Legacies	208
Of Lapsed Legacies	208
Of Contingent Legacies	209
Of the Residue	210
Of the Statute of Distributions	211
Of Hotchpot	212
Of the former Customs of London and York as to Distributions...	213
Of the Intestates' Estates Act, 1890	214
Of the Land Transfer Act, 1897, Part I.	214

Book III.

OF RIGHTS IN PRIVATE RELATIONS.

CHAP. I.

Of Master and Servant.

PAGE
Of Menial Servants 216
Of Labourers and Workmen 217
Of Apprentices 218
Of Injuries to Servant in the Course of his Employment ... 220
Of the Employers' Liability Act, 1880 221
Of the Workmen's Compensation Act, 1897 222
Of Employer's Liability for False Character 224
Of Employer's Liability for Injuries by Servant to Third Parties 225
Of the Servant's Personal Liability 227

CHAP. II.

Of Husband and Wife.

Of the Ecclesiastical Jurisdiction over Marriage 229
Of Marriage as a Civil Contract 230
Of Canonical Disabilities affecting Marriage 230
Of Civil Disabilities affecting Marriage 231
Of the Prohibited Degrees of Relationship 231
Of the Marriage Acts 234
Of the Foreign Marriages Acts 245
Of the Legal Identity between Husband and Wife... 247
Of the Husband's Power over the Wife's Person 250
Of the Effect of the Marriage on her Property 250
Of the Married Women's Property Acts, 1882, 1893 253
Of the Legal Disabilities of Married Women 255
Of the Legal Privileges and Protections of Married Women ... 257
Of the Manner in which the Legal Effects of Marriage are modified in Equity... 259
Of Marriage Settlements 262
Of Separation Deeds 264
Of Divorce... 265
Of Judicial Separation 267
Of Alimony 269
Of Nullity of Marriage 270

CHAP. III.

Of Parent and Child.

PAGE
Of Legitimacy 271
Of Proof of Non-access 272
Of the *ultimum Tempus pariendi* 272
Of the Writ *de Ventre inspiciendo* 273
Of the Duties of Parents towards their Children 274
Of the Power of Parents over their Children 277
Of the Duties of Children to their Parents 279
Of Bastards 280
Of the Legal Disabilities of Bastards 282
Of the Incestuous Marriages of Bastards 284

CHAP. IV.

Of Guardian and Ward.

Of the Legal Condition of the Ward 285
Of Full Age 285
Of the Capacities and Incapacities of Infants 286
Of Guardianship by Nature 289
Of Guardianship for Nurture 289
Of Guardianship in Socage 290
Of Guardianship by Statute 290
Of Guardianship by Election 291
Of Guardianship by Appointment of the High Court of Justice ... 291
Of Statutes for the Protection of Children 292
Of Guardianship *ad Litem* 293
Of Guardianship by Custom 293
Of the Rights and Duties of Guardians in general 294

Book IV.

OF PUBLIC RIGHTS.

PART I.

PAGE

OF THE CIVIL GOVERNMENT ... 297

CHAP. I.

Of the Parliament.

Of the Origin and History of Parliament 298
Of the Manner and Time of Parliament's assembling ... 300
Of the Frequency with which Parliaments are to be held .. 301
Of the Constituent Parts of Parliament 302
Of the House of Lords 303
Of the House of Commons 305
Of the Laws and Customs of Parliament 307
Of the Privileges of Parliament 309
Of the Laws and Customs relating to the House of Lords in particular 313
Of the Laws and Customs relating to the House of Commons in particular 315
Of the Election of Members of the House of Commons ... 316
Of the Qualifications of Electors in general 316
Of the Qualifications of Electors for Counties 316
Of the Qualifications of Electors for Boroughs 324
Of the Disqualifications of Electors 332
Of the Persons who may be elected Members 333
Of issuing the Writs for Elections 338
Of the Election by Ballot 340
Of the Elections for the Universities 341
Of the Removal of Soldiers from the Place of Election 343
Of Corrupt and Illegal Practices 344
Of the Return 348
Of Controverted Elections 349
Of Vacating a Seat in Parliament 352

CHAP. I.—(*continued.*) PAGE
Of the Speaker of the Lords, and of the Commons 352
Of the Manner in which Bills are passed 353
Of the Adjournment, Prorogation, and Dissolution of Parliament 361
Of the Triennial and Septennial Acts 364

CHAP. II.

Of the Sovereign, in his General Relation to the People; and the Law of Subject and Alien.

Of the Original Contract between the Sovereign and the People 366
Of the Sovereign's Duty to govern according to Law 366
Of the Coronation Oath 367
Of Allegiance 369
Of Natural-born Subjects 373
Of Aliens 375
Of Denizens 376
Of Persons Naturalized 377
Of Naturalization Acts 377
Of Foreign Protestants 378

CHAP. III.

Of the Royal Title.

Of the Hereditary Succession to the Crown... 379
Historical View of the Successions that have taken place ... 381
Of the Exclusion Bill 391
Of the Revolution of 1688 392
Of the Act of Settlement 393

CHAP. IV.

Of the Royal Family.

Of the Queen Regnant 395
Of the Queen Consort 395
Of the Husband of a Queen Regnant 396
Of a Queen Dowager... 398
Of the Prince of Wales and his Consort, and the Princess Royal... 399
Of the Royal Family... 400
Of the Royal Marriages Act 401

CHAP. V.

Of the Royal Councils, and of the Officers of State.

PAGE
Of the Councils belonging to the Sovereign 403
Of the Right of Audience 404
Of the Privy Council 405
Of the Cabinet 406
Of the Judicial Committee 409
Of other Committees of the Privy Council 410

CHAP. VI.

Of the Royal Prerogative.

Of the Limitation of the Royal Authority 412
Of Political or Civil Liberty 413
Of the Free Administration of the Law in the Courts of Justice... 415
Of the Independence of the Judges 417
Of the Right of Petitioning the Crown 418
Of the Nature of the Royal Prerogative 419
Of the Sovereign's Pre-eminence 420
Of the Maxim that the King never dies 420
Of the Maxim that the King can do no wrong 421
Of the Manner of avoiding the Royal Grant 421
Of Parliamentary Remonstrance against the Acts of the Sovereign 422
Of Parliamentary Impeachment of his Advisers 423
Of the Bar of his Rights by Lapse of Time 424
Of his Right of Embassy to Foreign States, and of the Law of Ambassadors 425
Of his Right to make Treaties 429
Of his Right to make War and Peace 429
Of his Right to issue Letters of Marque and Reprisal 430
Of his Right to grant Safe-Conducts 431
Of his Right to reject Laws 433
Of his Right to raise and regulate Armies and Fleets 434
Of his Right to appoint Ports and Havens 435
Of his Right to erect Beacons, Lighthouses, and Sea-marks ... 438
Of his Right to prohibit the Importation or Exportation of Arms, &c. 438
Of his Right to confine his Subjects within the Realm, and to recall them to the Realm 439

CHAP. VI.—(*continued.*) PAGE
Of his Right of erecting Courts of Judicature 440
Of his Right of pardoning Offences 441
Of his Right of issuing Proclamations 442
Of his Right as Guardian of Idiots and Lunatics, and of the Law relating to them 443
Of his Right as the Fountain of Honour, Office, and Privilege... 448
Of his Right to establish Markets and Fairs... 449
Of his Right to regulate Weights and Measures 450
Of his Right to stamp and regulate the Current Coin 454
Of his Rights as Head of the Church 457

CHAP. VII.

Of the Royal Revenue.

Of the Exchequer... 460
Of the ordinary Revenue of the Crown 461
Of the Custody of the Temporalities of Bishops 461
Of the First Fruits and Tenths, and herein of the King's Books, and of Queen Anne's Bounty 462
Of the Demesne Lands of the Crown 465
Of the Antient Revenue from Purveyance and Pre-emption, and the Revenue given in Compensation for it 467
Of Profits from Forests 468
Of Profits from Courts of Justice 469
Of Royal Fish, Wrecks, Treasure-trove, Waifs, and Estrays ... 470
Of Royal Mines 479
Of Forfeitures and Deodands 480
Of the Extraordinary Revenue of the Crown 481
Of the Land-tax 482
Of the Customs 487
Of the Excise 490
Of the Assessed Taxes 491
Of the Post Office... 492
Of the Stamp Duties... 494
Of the Duty on Offices and Pensions 499
Of the Income Tax 500
Of the National Debt 501
Of the Public Funds 502
Of the Consolidated Fund and the Public Income 504
Of the Civil List 505

CHAP. VIII.

Of the Royal Forces.

PAGE
Of the History and Progress of our Military System 508
Of the Former and Present Military Force 509
Of the Militia 510
Of the Yeomanry and other Volunteers 511
Of the Regular Army 512
Of the Navy 516
Of the Royal Marines 520

CHAP. IX.

Of the Nobility and other Ranks.

Of the Degrees of Nobility 521
Of the Commonalty 531
Of Precedence generally 533

CHAP. X.

Of Magistrates and other Public Officers.

Of the Nature of Offices in general 537
Of the Sheriff 546
Of Liberties within counties 546
Of the Under Sheriff and Deputy Sheriff... 548
Of Bailiffs 549
Of the Coroner 550
Of the Justices of the Peace 559
Of Constables 569
Of Watchmen 576

PART II.

PAGE

OF THE CHURCH 578

CHAP. I.

Of the Ecclesiastical Authorities.

Of the Clergy generally... 579
Of Archbishops and Bishops 583
Of Deans and Chapters 591
Of Archdeacons 593
Of Rural Deans 593
Of Rectors and Parsons 594
Of Lay Appropriators 595
Of Vicars 596
Of Perpetual Curates 598
Of Sinecure Rectors 599
Of Presentation 600
Of Institution... 601
Of Collation 601
Of Induction 602
Of Donatives 603
Of Residence 604
Of Pluralities 607
Of holding *in Commendam* 608
Of Deprivation and Resignation 608
Of Curates 610
Of Churchwardens 613
Of Church Rates 614
Of Parish Clerks 616
Of Sextons and Beadles 617

CHAP. II.

Of the Doctrines and Worship of the Church, and herein of the Laws as to Heresy and Nonconformity.

Of the Thirty-Nine Articles 619
Of the Liturgy 620
Of the Crown's Supremacy 621
Of Nonconformity 622
Of Toleration 624

CHAP. III.

Of the Endowments and Provisions of the Church.

PAGE

Of Ecclesiastical Property in General 628
Of Glebe 629
Of Advowsons and Presentations 630
Of the Benefices Act, 1898, as to the sale of... 632
Of Lapse 633
Of Simony 635
Of Tithes 638
Of Compositions and Exemptions 641
Of the Commutation of Tithes 643
Of the Estates which Ecclesiastical Persons may hold... ... 647
Of the Alienation of Ecclesiastical Property 647
Of Surplice Fees, Easter Offerings, and Mortuaries 653

CHAP. IV.

Of New Ecclesiastical Districts and Parishes, and other Extensions of the Original Church Establishment.

Of Parish Churches 657
Of Chapels 657
Of the Church Building Acts 659
Of the New Parishes Acts 663

INDEX ... ... 667—727

VOLUME III.

Book IV.

OF PUBLIC RIGHTS—continued.

PART III.

PAGE

OF THE SOCIAL ECONOMY OF THE REALM ... 1

CHAP. I.—SECTION I.

OF THE LAWS RELATING TO CORPORATIONS.—OF CORPORATIONS IN GENERAL.

Of Corporations Aggregate and Sole ... 2
Of Corporations Ecclesiastical and Lay ... 3
Of Corporations Civil and Eleemosynary ... 3
Of the Creation of Corporations ... 4
Of the Capacities and Incapacities of Corporations ... 7
Of Qualified Corporations ... 12
Of Incorporated Companies ... 13
Of the Visitation of Corporations ... 19
Of Hospitals ... 20
Of Colleges ... 21
Of the Dissolution of Corporations ... 22

CHAP. I.—SECTION II.

Of Municipal Corporations; and of County Councils, Parish Councils, and District Councils.

PAGE
Of Municipal Corporations 24
Of the Mayor, Aldermen, and Councillors 27
Of the Recorder, Coroner, and other Officers 28
Of the Borough Property and Borough Fund 30
Of Burgesses and Freemen 31
Of County Councils 33
Of the Chairman, Aldermen, and Councillors 34
Of County Boroughs and Administrative Counties 35
Of the Powers and Duties of the Council 36
Of the Revenue and Expenditure of the Council 38
Of the County Property and County Fund 40
Of Parish Councils and Parish Meetings 43
Of the Chairman and Overseers 44
Of the Powers and Duties of the Parish Council or Parish Meeting 44
Of District Councils (Urban and Rural) 47

CHAP. II.

Of the Laws relating to the Poor.

Of the Poor 50
Of the Right of Settlement 51
Of Gilbert's Act, and of the Select Vestry Act 52
Of the Poor Law Amendment Act 53
Of the Poor Law Board, and of the Local Government Board ... 55
Of Poor Law Unions, and of Guardians 56
Of the Modes of Acquiring a Settlement 58
Of the *Casual* (as distinguished from the *Settled*) Poor 61
Of the Liability of the Relatives for the Maintenance of Paupers 62
Of the Removal of Paupers 63
Of the Administration of the Poor Law 67
Of the Poor Rate Assessment 69
Of the Allowance of the Poor Rate 73
Of Rates collected with the Poor Rate 75

CHAP. III.

Of the Laws relating to Charities, Savings Banks, Friendly and other Societies.

Of Charities generally 77
Of the Charitable Trusts Acts 80
Of Schemes for Charities 81

CHAP. III.—(*continued.*) PAGE
Of Roman Catholic (and other) Charities... 82
Of the *Cy-près* Doctrine 86
Of Savings Banks generally... 87
Of Post Office Savings Banks 91
Of Friendly Societies and other kindred Societies 94
Of Industrial and Provident Societies... 98
Of Building Societies 98

CHAP. IV.

Of the Laws relating to Education.

Of Public Elementary Education 101
Of School Boards 103
Of Technical Schools 106
Of Public Schools 107
Of Endowed Grammar Schools... 108
Of Sites for Schools and Institutions 112
Of Parliamentary Grants for the Education of the Poor 115
Of Pauper Schools 117
Of Reformatory Schools 119
Of Industrial Schools 120

CHAP. V.

Of the Laws relating to Lunatic Asylums, and their Management.

Of Retreats and Inebriate Reformatories 124
Of Pauper Lunatic Asylums 125
Of the Lunacy Act, 1890 130
Of Criminal Lunatics 132
Of the Treatment of Lunatics generally 134
Of Registered Hospitals, and of Licensed Houses 135
Of Idiots 136

CHAP. VI.

Of the Laws relating to Prisons.

Of Gaolers 138
Of Houses of Correction... 138
Of the Prisons Acts 139
Of Prison Discipline 142
Of Millbank Prison 143
Of Parkhurst Prison 144
Of Pentonville Prison 145

CHAP. VII.

Of the Laws relating to Highways—and herein of Bridges and Turnpike Roads.

PAGE
Of the Dedication of Public Highways 146
Of the Liability for the Repair of Highways, and of Bridges ... 147
Of Highways generally 151
Of Turnpike Roads 157
Of Main Roads 161

CHAP. VIII.

Of the Laws relating to Navigation—and to the Mercantile Marine.

Of the Navigation Acts 163
Of the Merchant Shipping Act (1894)... 166
Of the Ownership, Registration, and Transfer of Merchant Ships 167
Of the Laws relating to Merchant Seamen 170
Of Pilotage 176
Of Lighthouses, Beacons, and Sea-Marks 179
Of the Liability of Shipowners... 182
Of the Laws relating to Fisheries 184

CHAP. IX.

Of the Laws relating to the Sanitary Condition of the People.

Of the Plague 188
Of Quarantine, and of the Modern Provisions in lieu thereof 188
Of the Asiatic Cholera 190
Of Vaccination for the Small Pox 191
Of the Diseases Prevention Acts 193
Of the Nuisances Removal Acts 193
Of the Public Health Act, 1848 194
Of the Local Government Board, and of Urban and Rural Sanitary Authorities 194
Of the Public Health Acts, 1875 to 1891 195
Of specific Acts providing for the Public Health 197

CHAP. X.

Of the Laws relating to Public Conveyances.

PAGE

Of Stage Coaches 200
Of Hackney Carriages 201
Of Railways, and of the Railway Acts 202
Of Conveyances by Water 206
Of the Passenger Acts 207

CHAP. XI.

Of the Laws relating to the Press.

Of the Censorship of the Press 210
Of the Liberty of the Press 211
Of certain Restrictive Regulations 212
Of the Newspaper Libel Acts 213

CHAP. XII.

Of the Laws relating to Houses of Public Reception and Entertainment.

Of Public Houses 214
Of the Licensing Acts 216
Of Refreshment Houses 219
Of Grocers' Licences 220
Of Theatres 221

CHAP. XIII.

Of the Laws relating to Professions.

(A.) Of the Medical Profession 223
Of Physicians 223
Of Surgeons 224
Of Apothecaries 225
Of Chemists and Druggists 226
Of the Medical Acts, 1858 and 1886 227
Of Schools of Anatomy 232
Of Dentistry and Dentists 233

CHAP. XIII.—(*continued.*)

PAGE
(B.) Of the Legal Profession 234
Of Service under Articles 235
Of the Registrar of Solicitors 237
Of Admission, and of the Annual Certificate 237
Of the Privileges and Disabilities of Solicitors... 240
Of the Retainer and Duties of Solicitors 241
Of the Bills of Costs and Remuneration of Solicitors 243
Of the Remedies for and against Solicitors 251

CHAP. XIV.

Of the Laws relating to Banks.

Of the Origin of Banks 253
Of the Bank of England 254
Of Banks of Issue, or of Deposit 255
Of Branches of the Bank of England 256
Of the Banking Act of 1844—
(1) As regards the Bank of England 257
(2) As regards other Banks 259
Of Banks incorporated under the Companies Acts, 1862—1898 ... 260
Of the Sale of Bank Shares 262
Of the Bankers' Books Evidence Act 262

CHAP. XV.

Of the Laws relating to the Registration of Births and Deaths.

Of Ecclesiastical Registration 263
Of Civil Registration 265
Of the Registration of Births 267
Of the Registration of Deaths 268
Of Non-Parochial Registers... 269

Book V.

OF CIVIL INJURIES.

CHAP. I.

OF THE REDRESS OF INJURIES (I.) BY THE MERE ACT OF THE PARTIES; AND (II.) BY THE MERE ACT (OR OPERATION) OF THE LAW.

PAGE

(I.) Of Redress by the mere Act of the Parties 270
Of Self-defence 271
Of Recaption or Reprisal 271
Of Entry 272
Of Abatement 273
Of Distress 273
Cases in which Remedy available 274
Things that are Not Distrainable 275
Mode of Distraining 281
Sale of Distress 284
Of the Seizure of Heriots, Waifs, &c.... 287
Of Accord and Satisfaction 288
Of Arbitration 289
Of Setting Aside or Enforcing the Award 293
(II.) Of Redress by the mere Act of the Law 294
Of Retainer 294
Of Remitter 296

CHAP. II.

OF THE COURTS IN GENERAL.

Of Courts 298
Of Solicitors 301
Of Counsel 302

CHAP. III.

Of the Inferior Courts.

PAGE
Of the Jurisdiction generally 307
Of the Court Baron 308
Of the Hundred Court 309
Of the Sheriff's County Court 310
Of Borough Courts 312
Of the Courts of the Commissioners of Sewers 314
Of the County Courts 317
Their Ordinary Jurisdiction, and the Procedure therein ... 320
Their Equitable Jurisdiction 329
Their Admiralty Jurisdiction, and the Procedure therein ... 331
Their Jurisdiction in Bankruptcy, and in Winding-up ... 335
Their Miscellaneous Summary Jurisdiction 338
Of the (old) Stannary Courts (now the County Court of Cornwall) 340
Of the Ecclesiastical Courts 342
Their Jurisdiction 348
Procedure in 353
Of the Oxford and Cambridge University Courts 356
Of the Court of Chivalry and Courts Martial 357

CHAP. IV.

Of the Supreme Court of Judicature.

Of the Superior Courts 360
Of the High Court of Chancery 361
Of the Court of Queen's Bench 369
Of the Court of Common Pleas 371
Of the Court of Exchequer 372
Of the High Court of Admiralty 374
Of the Court of Probate 377
Of the Court for Divorce and Matrimonial Causes ... 377
Of the Court of Bankruptcy 377
Of the Judges of the Superior Courts 377
Of the Courts of Lancaster and Durham 379
Of the Courts of Assize 381
Of the High Court of Justice 384
Of the Chancery Division 384
Of the Queen's Bench Division 384
Of the Common Pleas Division 385
Of the Exchequer Division 385
Of the Probate, Divorce, and Admiralty Division 385
Of the Bankruptcy Division 386
Of the Court of Appeal 387

CHAP. V.

Of the ultimate Courts of Appeal.

PAGE
Generally 390
Of the House of Lords 391
Of the Judicial Committee 392

CHAP. VI.

Of the different Species of Civil Injuries and their Remedies—and herein of the Remedy by Action Generally.

Of Actions generally... 394
Of Personal Actions 395
Of Real Actions 395
Of Mixed Actions 395
Of Actions on Contracts or on Torts 396
Of the Forms of Personal Actions 397
Of Actions Local or Transitory 398
Of Actions for the Invasion of a Right (*Injuria sine damno*) ... 399
Of *Injuria cum Damno* 400
Of *Damnum sine Injuriâ* 401
Of the Transfer of Rights of Action 402
Of the Transmission of Rights of Action on Death... 403

CHAP. VII.

Of the different Species of Civil Injuries, and their Remedies.

Of Injuries affecting Personal Rights 405
Of Injuries to Life or Limb 405
Of Injuries to Health 408
Of Injuries to the Reputation,—
Of Slander 409
Of Libel 411
Of the Defences to Actions for Slander and Libel 413
Of Malicious Prosecutions 417
Of False Imprisonment or Malicious Arrest 418

CHAP. VII.—(*continued.*) PAGE
Of Injuries affecting Rights of Property 419
(A.) Real Property 419
(1.) Of Ouster or Dispossession, and of the Remedies therefor (Ancient and Modern) 420
(1A.) Of certain Legislative Provisions in favour of Landlords 426
(2.) Of Trespass to Land, and of the Remedy therefor 429
(3.) Of Nuisances (Public and Private), and of the Remedies therefor 432
(4.) Of Waste, and of the Remedy therefor 435
(5.) Of Subtraction 438
(6.) Of Disturbance... 439
(6A.) Of Disturbance of Patronage, and of the Remedy therefor 443
(B.) Personal Property 448
(1.) To Things in Possession 448
(2.) To Things in Action 455
Of Injuries affecting Rights in Private Relations 459
(A.) Husband and Wife 459
(B.) Parent and Child 462
(C.) Guardian and Ward 462
(D.) Master and Servant 463
Of Injuries affecting Public Rights 465

CHAP. VIII.

Of Equity in its Relation to Law.

Of the Distinctions between Law and Equity 467
Of the Subjects of Equitable Jurisdiction 473
Of Equitable Relief 475
Of Equity in Relation to Trusts 476
Of Decreeing Specific Performance 482
Of an Injunction 483
Of Perpetuating Testimony... 484

CHAP. IX.

Of the Limitation of Actions.

Of the Statutes of Limitation as applicable to Land 486
The Old Limitations 487
The Modern Limitations 489
Of the Statutes of Limitation as applicable to Things other than Land 498
Of the Specific Limits of Time for Specific Actions... 501

CHAP. X.

Of the Proceedings in an Action.

PAGE

Of the Mode of Commencing an Action 505
Of the Process (or Writ of Summons); and of its Preparation, Issue, and Service 506
Of the Appearance of the Defendant,—and of Judgments for Default of (and Notwithstanding) Appearance 513
Of the Summons for Directions 517
Of the Pleadings 519
Of Payment into Court... 530
Of Discontinuance 533
Of the Trial 535
Of Juries, Common and Special 537
Of Challenges to the Jurors 539
Of the Evidence at the Trial 544
Oral Evidence 545
Affidavit Evidence 546
Competency and Credibility of Witnesses 547
Privilege of Witnesses 549
Contradiction of Witness 550
Corroboration of Witness 551
Admissions of Documents and of Facts 552
Of Primary and Secondary Evidence 555
Of Presumptions 556
Of the Summing-up by the Judge 557
Of the Verdict 558
Of Trial before a Judge 561
Of Trial before a Referee (Official or Special) 562
Of the Judgment 564
Of the Motion for Judgment 565
Of the Motion for a New Trial 566
Of the Writ of Enquiry on Interlocutory Judgment ... 568
Of the Entry of Judgment... 568
Of Terms and Sittings 570
Of Costs 573
Of the Execution on the Judgment 576
Of the Writ of *Fi. Fa.* 580
Of the Writ of *Levari Facias* 582
Of the Writ of *Elegit* 583
Of a Charging Order 584
Of a Garnishee Order 585

CHAP. X.—(*continued.*) PAGE
Of Appeals 586
Of the Appeal Motion 588
Of the Times appointed for taking the Divers Steps in an Action 589

CHAP. XI.

Of Proceedings in the Chancery Division.

(A.) In Actions commenced by Writ of Summons 592
Of the Process... 592
Of the Pleadings 594
Of the Trial and Evidence 595
Of the Judgment 597
Of the Execution 598
(B.) In Actions commenced by Originating Summons 600
Of the Hearing and of the Evidence thereon 601

CHAP. XII.

Of Proceedings in the Probate, Divorce, and Admiralty Division.

Of a Probate Action 603
Of the Caveat, Writ, and Citation 604
Of the Pleadings 606
Of the Trial 608
Of the Appeal 608
Of a Divorce Petition 609
Of the Citation 609
Of the Pleadings,—and of Absolute and Discretionary Bars 611
Of the Trial and Evidence 614
Of the Appeal 615
Of the Intervention of the Queen's Proctor... 616
Of an Admiralty Action... 616
Of Actions *in Rem* and *in Personam*... 617
Of the Trial and Evidence... 619
Of the Appeal 620

CHAP. XIII.

Of Proceedings affecting the Crown.

PAGE

Of Injuries by the Crown, and of the Remedy by Petition of Right 621
Of Injuries to the Crown, and of the Remedy by Inquisition or Inquest of Office... 624
Of the Remedy by Writ of Extent 629
Of Extent in Chief, and of its Effect... 629
Of Extent in Aid, and of its Availability 631
Of the Extent called *Diem Clausit Extremum* 632
Of the Writ of *Scire Facias* 632
Of Civil Informations 633
Of Costs in Crown Suits... 634

CHAP. XIV.

Of Interlocutory and Incidental Proceedings, and herein of Prerogative Writs.

Of Interlocutory Orders, and of Motions in Actions 636
Of Interim Injunctions, and Interim Receivers 638
Of Discovery and Inspection 639
Of Interpleader 639
Of Prerogative Writs, and of Motions for same... 640
Of the Writ of *Scire Facias* 640
Of the Writ of *Procedendo* 640
Of the Writ of *Mandamus*... 642
Of the *Mandamus* in an Action 646
Of the Writ of Prohibition 647
Of the Writ of *Quo Warranto*... 650
Of the Writ of *Habeas Corpus* 653
Of the Writ of *Certiorari* 662

INDEX 665

VOLUME IV.

Book VI.

OF CRIMES.

CHAP. I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENTS.

	PAGE
Of the Distinction between Crimes and Civil Injuries	3
Of Misdemeanors and Felonies	5
Of the Right to Inflict Punishment	9
Of the Object of Punishment	11
Of the Measure of Punishment...	12
Of Over-Severity in Punishments	15

CHAP. II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

Of Persons who are not capable of committing Crimes	17
Of Infancy	18
Of Idiocy or Lunacy	21
Of Drunkenness	23
Of Misadventure, Misfortune, or Chance	24
Of Compulsion and Necessity	25
Of the Coercion of a Wife	26
Of the Incapacity of the Sovereign	29

CHAP. III.

OF PRINCIPALS AND ACCESSORIES.

Of Principals in the First and in the Second Degree	30
Of Accessories...	31
Of Accessories before the Fact	32
Of Accessories after the Fact	33
Of the Punishment of Accessories	35

CHAP. IV.

Of Offences against the Person and Reputation.

PAGE

Of Homicide 37
Of Justifiable Homicide 38
Of Excusable Homicide 41
Of Felonious Homicide 46
Self-Murder 46
Manslaughter 49
Murder 52
Of Malice 56
Of the Death Punishment 60
Of Attempts to Murder 63
Of Conspiracy to Murder 64
Of Acts causing Danger to Life or Bodily Harm 65
Of Procuring Miscarriage 68
Of Concealment of Birth 68
Of Abduction of Females 69
Of Rape 71
Of Defilement or Abuse of Children 76
Of Kidnapping and Child Stealing 77
Of Abandoning Children 78
Of Endangering Railway Passengers 79
Of Setting Spring Guns or destructive Engines 80
Of Assaults, Batteries, and False Imprisonment 80
Of Bigamy 81
Of Publication of a Libel 83

CHAP. V.

Of Offences against Rights of Property, or arising out of Contract.

Of Arson 86
Of Burglary 90
Of Sacrilege and Housebreaking 97
Of Larceny at Common Law 98
Of Larceny by Statute 105
Of Larceny in a Dwelling-house 107
Of Larceny in Ships, Wharfs, &c. 107
Of Larceny from the Person, and of Robbery 108
Of Assault with intent to Rob 111
Of Extorting Money by Threats, Accusations, &c. 111
Of Larceny or Embezzlement by Clerks, Servants, &c. 112

CHAP. V.—(*continued.*) PAGE
Of Fraudulent Misappropriations, Mutilations, and Falsifications 114
Of Larceny and other Offences in relation to the Post Office ... 118
Of Receiving Stolen Property 119
Of Malicious Mischief 121
Of Forgery 124
Of Forgery of Trade Marks... 128
Of False Personation 129
Of False Pretences 130
Of Fraudulent Concealment of Deeds, or Falsification of Pedigree 131
Of Falsification of Accounts 131
Of Offences relating to the Coin 132
Of Fraudulent Debtors 137
Of Cheating 138

CHAP. VI.

Of Offences against Public Order, Internal and External.

Of High Treason 139
Of Misprision of Treason 150
Of Discharging Fire Arms, &c., at the Queen 151
Of Treason Felony 152
Of Scandal against the Sovereign 153
Of *Præmunire*... 154
Of Contempts against the Title of the Sovereign 158
Of Contempts against the Crown's Ecclesiastical Supremacy ... 158
Of Contempts against the Royal Palaces 159
Of Maladministration of High Officers 160
Of Selling Public Offices... 161
Of Offences relating to the Customs 161
Of Offences relating to the Royal Stores, Ships, &c. 163
Of Serving Foreign States 164
Of Desertion, and Seducing to Desert... 165
Of Unlawful Oaths, and Illegal Societies... 166
Of Miscellaneous Contempts against the Prerogative 167
Of Riotously Demolishing Churches, Houses, &c. 168
Of Destroying Game by Night 170
Of Affrays 172
Of Riots, Routs, and Unlawful Assemblies 173
Of Tumultuous Petitioning 176
Of Forcible Entry and Detainer 178
Of Riding Armed 178
Of Spreading False News 178

CHAP. VI.—(*continued*). PAGE
Of False and Pretended Prophecies 179
Of Challenges to Fight 179
Of Offences against the Law of Nations 180
Of the Violation of Safe Conducts 181
Of Violating the Rights of Ambassadors 183
Of Piracy 184

CHAP. VII.

Of Offences against Religion, Morals, and Public Convenience.

Of Apostasy 187
Of Heresy 189
Of Blasphemy 193
Of Reviling the Ordinances of the Church 193
Of Swearing and Cursing 195
Of Witchcraft, Sorcery, &c. 195
Of Religious Impostors 197
Of Simony 197
Of Sabbath-Breaking 198
Of the Crime against Nature 200
Of Selling Unwholesome Provisions 201
Of Common Nuisances 205
Of Lewdness 211
Of Drunkenness 213
Of Furious Driving 214
Of Cruelty to Animals 215
Of Cruelty to Children 217
Of Taking up Dead Bodies 219
Of Refusing to serve a Public Office 220
Of Disorderly Conduct, &c. 220
Of Vagabonds, Gipsies, &c. 221

CHAP. VIII.

Of Offences affecting the Administration of Justice and the Maintenance of Public Order.

Of Stealing, Injuring, Forging, and Falsifying Records 223
Of Striking, or other Outrage, in the Superior Courts 225
Of Intimidation of Parties or Witnesses 226
Of Obstructing a Lawful Arrest or Process 227
Of Escape and Prison Breach 228
Of Rescue, and Aiding Prisoners to Escape 230

CHAP. VIII.—(*continued*). PAGE
Of Taking a Reward for restoring Stolen Goods 232
Of Compounding of Felony 233
Of Misprision of Felony 234
Of Compounding Informations and Misdemeanors 234
Of Common Barratry 235
Of Maintenance 236
Of Champerty 237
Of Conspiracy 238
Of Perjury 241
Of Bribery 243
Of Corrupt Practices by Municipal and other Public Bodies ... 245
Of Negligence in Public Officers 246
Of Oppression and Tyrannical Partiality 247
Of Extortion 247

CHAP. IX.

Of the Means of Preventing Offences.

Of Preventing the Commission of Crimes 248
Of Recognizances 249
Of Security for Keeping the Peace 251
Of Security for Good Behaviour 252
Of the Probation of First Offenders 255
Of Police Supervision 256

CHAP. X.

Of Courts of a Criminal Jurisdiction.

Of the Courts of Criminal Jurisdiction 258
(A.) The Criminal Courts of a General Jurisdiction ... 258
Of the High Court of Parliament 258
Of the Court of the Lord High Steward 261
Of the Queen's Bench Division 266
Of the Admiralty Jurisdiction 269
(B.) The Criminal Courts of a Special Jurisdiction 272
Of the Assizes 272
Of the Central Criminal Court 275
Of the General Quarter Sessions 276
Of the Coroner's Court 282
Of the Sheriff's Tourn (*abolished*) 282
Of the Court Leet or View of Frankpledge 282
Of the Court of the Clerk of the Market 284
Of the Court of the Lord Steward of the Household ... 285
Of the University Courts (Oxford and Cambridge) 286

CHAP. XI.

Of Proceedings of a Summary Nature, and herein of Summary Convictions and Attachment.

PAGE

Of Summary Proceedings generally 290
Of Proceedings before the Revenue Commissioners 29 0
Of Proceedings before Justices of the Peace... 291
The Offences which fall within their Jurisdiction... ... 292
The Mode of the Procedure before them 297
Of Attachments for Contempt 300

CHAP. XII.

Of Arrests on Criminal Charges.

Of Criminal Arrest 306
Of Arrests upon a Warrant... 306
Of Arrests without a Warrant 310
Of Hue and Cry 313

CHAP. XIII.

Of Commitment and Bail.

Of the Examination before the Magistrate 316
Of Discharging 317
Of Bailing 317
Of Committing to Gaol 319
Of Recognizances to Prosecute and to give Evidence 320

CHAP. XIV.

Of the several Modes of Prosecution.

Of a Presentment... 322
Of an Indictment 323
Of an Information 334
Of an Appeal (*now Obsolete*) 341

CHAP. XV.

Of Process: and herein of Certiorari.

Of Process after Indictment found 343
Of Capias and Bench Warrant 343
Of Outlawry, and the Reversal thereof 344
Of *Certiorari* 346

CHAP. XVI.

Of Arraignment and its Incidents.

PAGE
Of Arraignment 351
Of Standing Mute 352
Of Confession 354

CHAP. XVII.

Of Plea and Issue.

Of Pleading to the Indictment 356
Of the Plea to the Jurisdiction 358
Of a Demurrer 358
Of Pleas in Abatement 359
Of Special Pleas in Bar 360
Of the Plea of Not Guilty (*being the General Issue*) ... 364

CHAP. XVIII.

Of Trial and Conviction.

(A.) Of the now Obsolete Modes of Trial 366
Ordeal 366
Corsned 368
Battle 369
(B.) Of the Existing Modes of Trial 374
Of the Trial of Peers 374
Of Trial by Jury 375
Of Challenges 378
Of the Evidence 382
Of Husbands and Wives as Witnesses 386
Of the Criminal Evidence Act, 1898 390
Of Conviction 392
Of Acquittal 393
Of the Costs of the Prosecutor 394
Of the Restitution of Stolen Goods 395

CHAP. XIX.

Of Judgment and its Consequences.

Of Motion in Arrest of Judgment 398
Of Pronouncing Judgment 400
Of the Punishment or Sentence 401

CHAP. XIX.—(*continued*). PAGE
Of Fines 402
Of Imprisonment 405
Of Whipping 406
Of Penal Servitude 407
Of Police Supervision 409
Of Death 410
Of Attainder 411
Of Corruption of Blood 416
Of Forfeiture (of Goods and Chattels) on Conviction 417
Of Attainder and of Conviction, and of their different operations as regards Forfeiture 417

CHAP. XX.

Of Reversal of Judgment.

Of Reversal without Error 420
Of Reversal upon Writ of Error 421
Of Reversal of Outlawry 422

CHAP. XXI.

Of Reprieve and Pardon.

Of Reprieve 423
Of Pardon 424

CHAP. XXII.

Of Execution.

Of the Manner of carrying into Execution a Sentence of Death ... 433
Of the Prerogative of the Crown as to Mode of Execution ... 435

CONCLUSION.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENT OF THE LAWS OF ENGLAND.

PAGE

Of the Progress from the earliest Times to the Norman Conquest 438
Of the Progress from the Norman Conquest to Edward I. ... 445
Of the Progress from Edward I. to the Reformation 455
Of the Progress from the Reformation to the Restoration ... 461
Of the Progress from the Restoration to the Revolution 470
Of the Progress from the Revolution to the Present Time ... 472

TABLE OF STATUTES 481

GENERAL INDEX ... ... 525—702

NOTICE TO THE READER.

The portions of these Commentaries which lie between brackets [ ] are taken *substantially* from Blackstone, and rest, chiefly, on his authority; but the parts so taken are in almost all cases materially abridged, and the language of them modernised. To enable the reader to distinguish these portions from the other parts of the work, upon merely opening the volume, the continuation of an extract is marked by a new bracket at the top of the page.

INTRODUCTION.

SECTION I.

OF THE STUDY OF THE LAW.

AT the outset of a work like the present, in the course of which it is proposed (though with the aid, in part, of materials derived from a former writer) to bring under examination no less a subject than the entire body of the English law, the discouragement to which the writer is naturally inclined by the magnitude of the task before him, is counteracted by the recollection of its general importance. The subject is one to which no class of readers in the realm can be indifferent; [for it is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned, lest he incur the censure, as well as the inconvenience, of living in society without knowing the obligations which it lays him under; and a knowledge of the law is still more incumbent upon men of rank and education, the nobility and gentry of this realm, who are under duties both to the public and to themselves, and cannot discharge such duties without some degree of knowledge in the laws. And gentlemen, in particular, who profess (or who practise) the civil or the canon law are (of all men) the most bound to make themselves acquainted with the common law,—for the civil and canon laws are of no force in this kingdom, save so far as they have in some few cases been allowed by our laws; and in those cases wherein a reception has been thus allowed to the civil and canon laws, if either

[they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them,—or if the judges proceed according to the decisions of those laws, in cases wherein they are controlled by the law of the land,—the common law will, in either instance, prohibit and annul their proceedings (*a*)].

The general necessity for an acquaintance with the common law being thus apparent, it might naturally be supposed that some provision would antiently have been made for this, as for other branches of education, in the universities of Oxford and Cambridge: the reverse, however, was the fact; and the explanation is historical and instructive.

[The common law is, or consists of, a collection of unwritten customs, which have subsisted immemorially in this kingdom, being excellently adapted to the genius of the English nation; and these customs, with their associated maxims, were at one time, as Mr. Selden tells us, taught in the monasteries, *in the universities*, and in the families of the principal nobility (*b*),—the clergy, in particular, having been peculiarly remarkable for their devotion to the study of the law (*c*),—*Nullus clericus nisi causidicus* being the character given of them, soon after the Conquest, by William of Malmsbury (*d*). The judges also were usually created out of the sacred order (*e*); and all the inferior offices were supplied by the lower clergy,—which occasioned their successors to be denominated *clerks*, as they are to this day. But the common law not being committed to writing, but only handed down by tradition, was not relished by the foreign clergy, who came over during the reigns of the Conqueror and his two sons; and its acceptability was seriously diminished in the 12th century by the new impulse then given

(*a*) Hale, Hist. C. L. 2; Selden in Fletam; 5 Rep., *Caudrey's Case*; 2 Inst. 599.

(*b*) In Fletam, 7, 7.

(*c*) Cæsar de Bello Gal. 6, 12.

(*d*) De Gest. Reg. 1, 4.

(*e*) Dugdale, Orig. Jurid. ch. 8; Grand Coustumier, ch. 9.

[to the study of the Roman law (*f*),—the Roman law then becoming in a particular manner the favourite of the popish clergy, and the study of it being introduced into several of the foreign universities, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science ; and many nations on the continent, beginning to recover just then from the convulsions consequent upon the overthrow of the Roman empire, also adopted the civil law as the basis of their several constitutions,—blending and interweaving it among their own feodal customs, in some places with a more extensive, in others with a more confined authority (*g*). And it was not long before the prevailing tendency reached to England ; for Theobald, a Norman abbot, being elected, in the year 1138, to the see of Canterbury, and being extremely addicted to this new study, brought over with him in his retinue many learned proficients therein ; and among the rest, Roger, surnamed Vacarius, whom he placed in the university of Oxford to teach it to the people of this country (*h*). Nevertheless, the Roman law did not meet with an easy reception in England ; for although the monkish clergy, devoted to the will of a foreign primate, received it with zeal, yet the laity, who were more interested to preserve the old constitutions, continued wedded to the common law ; and King Stephen even published a proclamation forbidding the study of the

(*f*) Hallam's Middle Ages, 3rd vol., p. 513; 1 Bla. Com. 18; 1 Reeves, Hist. Eng. Law, p. 66. It has been said (and the opinion is adopted by Blackstone) that this revival was owing to the accidental discovery of a copy of the Pandects at the capture of Amalfi by the Pisans, about the year 1130. But there appears to be no sufficient evidence that any such discovery took place. (See Hallam, *ubi sup.* ; and Histoire du Droit Romain au Moyen-Age, *par* M. De Savigny, ch. xviii. s. 35, ch. xxii. ss. 164, 167.)

(*g*) Domat's Treatise of Law c. 13, s. 9 ; Epistol. Innocent IV. in M. Paris, A.D. 1254.

(*h*) Gervas. Dorobern. Act. Pontif. Cantuar. Col. 1665.

[Roman law (*i*),—a proclamation which was treated by the monks as a piece of impiety (*k*), and which although it prevented the introduction of the Roman law into our courts of justice, yet did not hinder the clergy from teaching it in their own schools and in the monasteries.

From this time the nation seems to have been divided into two parties ; on the one hand, the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil law and that of the Roman church (or canon law), which two systems now came to be inseparably interwoven with each other ; and, on the other hand, the nobility and laity, who adhered with equal pertinacity to the old common law,—both of them reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers speak of our municipal laws upon all occasions (*l*) ; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton, when the prelates endeavoured to procure an Act to declare all bastards legitimate upon the subsequent intermarriage of their parents ; but "all the earls and barons with one voice answered, that they would not change the laws of England, which had hitherto been used and approved" (*m*) ; and in the reign of Richard the Second, the nobility again declared, "that the realm of England hath never been unto this hour,—neither by the consent of our lord the king, and the lords of parliament, shall it ever be,—ruled or governed by the civil law" (*n*).

(*i*) Rog. Bacon. citat. *per* Selden in Fletam, 7, 6; in Fortesc. c. 33; and 8 Rep. Pref.

(*k*) Joan. Sarisburiens. Polycrat. 8, 22.

(*l*) *Ibid.* 5, 16; Polydor. Virgil, Hist. 1, 9.

(*m*) "*Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*" Stat. Merton, 20 Hen. 3, c. 9.

(*n*) Selden, Jan. Anglor. 1, 2, s. 43 ; in Fortesc. c. 33.

[While things were in this situation, the clergy, finding it impossible to root out the municipal law, withdrew themselves by degrees from the temporal courts; and in the reign of Henry the Third, episcopal constitutions were published, forbidding the clergy to appear as advocates *in foro seculari* (*o*); and they did not long continue to act therein as judges either, not caring to take the oath of office, to in all things determine according to the law and custom of the realm (*p*); and Pope Innocent the Fourth actually forbade the very reading of the common law by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity.

The common law, being thus neglected by the clergy, and consequently excluded from the universities, the study and practice of it devolved into the hands of laymen, who (Sir John Fortescue, writing in the reign of Henry the Sixth, informs us), entertained upon their parts a most hearty aversion to the civil law, and made no scruple to profess their contempt, nay, even their ignorance of it, in the most public manner (*q*); and the study received an impetus and encouragement by the fixing of the Court of Common Pleas in one certain spot, namely, at Westminster, —which great improvement in the administration of justice was effected by an article in the great charter of liberties, both that of King John and that of King Henry the Third, by which it was directed, that "Common Pleas should no longer follow the king's court, but be held in some certain place." The effect of which was to bring together the professors of the municipal law, who before were dispersed about the kingdom, and to form them into an aggregate body or society addicted (as Spelman observes) wholly to the study of the common law (*r*); and they soon brought that law to the pitch of perfection,

(*o*) Wilkins, Concil. vol. i. pp. 574, 599.

(*p*) Selden in Fletam, 9, 3.

(*q*) Fortesc. de Laud. LL. ch. 25.

(*r*) Glossar. 334.

[which it attained under the auspices of our English Justinian, King Edward the First.

In consequence of this lucky assemblage, the practitioners of the common law naturally fell into a kind of order ; and, being excluded from Oxford and Cambridge, they established a new university of their own,—purchasing from time to time certain houses (afterwards called the inns of court and of chancery) between the city of Westminster and the city of London,—for advantage of ready access to the one, and plenty of provisions in the other (*s*) ; and in these inns exercises were performed, lectures read, and degrees conferred in the common law,—the degrees being those of barristers, at first styled apprentices (*apprenticii ad legem*), who answered to the bachelors ; and those of serjeants (*servientes ad legem*), who answered to the doctors of the universities (*t*). The crown also soon took under its protection this infant seminary of the common law ; and the more effectually to foster it, King Henry the Third, in the nineteenth year of his reign, issued an order to the Mayor and Sheriffs of London, commanding that no regent of any law schools *within* the city should, for the future, teach law therein (*u*) ; and whether the civil law only was prohibited by the order,—which is Mr. Selden's opinion (*x*),—or whether the municipal law also was included in the prohibition,—as Sir Edward Coke understands it,—the effect of it was to collect all the common lawyers into the one public university then newly instituted in the suburbs (*y*).

In this juridical university, for such it is insisted to have been by Sir Edward Coke (*z*), there were two sorts of collegiate houses ; one called inns of chancery, in which

(*s*) Fortesc. c. 48. The Inns of Court are the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn.

(*t*) As to barristers and serjeants, see *post*, bk. v., ch. ii.

(*u*) "*Ne aliquis scholas regens delegibus in eadem civitate, de cætero ibidem leges doceat.*"

(*x*) In Flet. 8, 2.

(*y*) See 2 Inst. proëm.

(*z*) 3 Rep. pref.

[the younger students of the law were usually placed, "learning and studying (says Fortescue) the originals; " and as they grew to ripeness, they were admitted into the " greater inns or inns of court " (*a*). And although, under the influence of the monks our universities neglected the study, yet in the time of Henry the Sixth it was become the universal practice for the young nobility and gentry to be admitted into the inns of court and chancery, there to be instructed in the originals and elements of the laws (*b*).]

At the present day the inns of chancery have sunk into insignificance, but the inns of court still enjoy their antient reputation with the sons of our nobility and gentry; and they exercise also the exclusive privilege of conferring the degree of *barrister at law*,—the possession of which degree is and remains an indispensable qualification for practising as counsel in the superior courts. And for the obtaining of this degree, it is necessary to be enrolled as a student in one or other of these inns (*c*), and after a certain period to apply to its principal officers (or *benchers*) for a *call to the bar* (*d*) ; and as a qualification for call, the

(*a*) C. 49.

(*b*) The Inns of Chancery were latterly Clifford's Inn, Clement's Inn, New Inn, Staple's Inn, and Barnard's Inn. Besides these, there were formerly Furnival's Inn, the Strand Inn, Lyons' Inn, and Thavies' Inn. As to Inns of Chancery, see *Rex* v. *Barnard's Inn*, 6 Ad. & El. 17, and the report of the commissioners appointed to inquire into their constitution, which was presented to Parliament in the year 1855.

(*c*) The candidate for admission as a student, unless he shall have passed a public examination at some university within the British dominions, or for a commission in the Army or Navy, or for the Indian Civil Service, or for the Consular Service, or for cadetships in the three eastern colonies of Ceylon, Hong Kong, and the Straits Settlements, must in general pass a preliminary examination testing his knowledge of the English and Latin languages, and of English history. (See Consol. Reg., December, 1897, superseding those of January, 1894). As to the relation which exists between the Inns of Courts and those who have become members, see *Neate* v. *Denman*, Law Rep., 18 Eq. Cas. 127; *Manisty* v. *Kenealy*, 24 W. R. 918.

(*d*) An appeal from the decision of the benchers as to calling to the bar or disbarring, lies to the

student must (as the general rule) have kept commons for three years (*i.e.* twelve terms), by dining at least six times in each term in the hall of the society into which he has obtained admission ; excepting that if he is a member of any of the universities of Oxford, Cambridge, Dublin, London, Durham, St. Andrews, Aberdeen, Glasgow, and Edinburgh, or of the Victoria University, Manchester, or of the Royal University of Ireland, dining three times in each term is sufficient (*e*). Moreover, no student may be called to the bar, unless he has passed a public examination for the purpose of ascertaining his fitness, and has obtained a certificate of having passed.

Accordingly, a public examination, for all the inns collectively, takes place periodically (*f*) ; and this examination is compulsory in the case of all students, excepting as regards certain colonial barristers who desire to be called to the English Bar.

Academical instruction in the law may, however, now be obtained in other schools than those of the inns of court ; and though no provision for instruction in the common law was antiently made at either Oxford or Cambridge, that deficiency has been long since redressed by the munificence of private donors, who at each of these universities have founded professorships, with appropriate endowments for that purpose ; and in the various colleges affiliated to the University of London, and in the Victoria University (*g*) at Manchester (formerly Owens

judges in their capacity of *visitors*. (See *The King* v. *Lincoln's Inn*, 4 B. & C. 855.)

(*e*) Consol. Reg., December, 1897.

(*f*) Consol. Regulations, December, 1897. For the purpose of affording to students the means of obtaining instruction and guidance in their legal studies, Professors (now called Readers and Assistant Readers) are appointed (by a joint council of the Four Inns) of Roman Law, of Jurisprudence, of Common Law, of Equity, and of the Law of Real and Personal Property.

(*g*) By the Victoria University Act (51 & 52 Vict. c. 45), the graduates of this university have been placed upon the same level

College), and in the law colleges at Liverpool, and at Bristol, and elsewhere in England, there are also now very effective schools of the common law.

with graduates of the Universities of Oxford, Cambridge, and London, with regard to privileges and exemptions, and eligibility to appointments. By the University of London Act, 1898 (61 & 62 Vict. c. 62), provision is made for the re-constitution of the University of London.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

[MAN, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being; and as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will,—which will is called the Law of Nature; and there are three great principles of this law, namely,—that we should live reputably, should hurt nobody, and should render to every one his due; and to these three principles Justinian has, in fact, reduced the whole doctrine of law (*h*).]

The constitution and frame of humanity afford a striking proof of the benevolence of the Creator,—the laws of eternal justice being inseparably interwoven with the happiness of every individual; and the human reason not sufficing, of itself, to teach this law, therefore the beneficence of the Deity has aided the imperfection of human reason by an immediate and direct revelation, this revealed law being declared by the Holy Scriptures; and upon these two foundations, nature and revelation, depend all human laws.

But man was formed for society, and is not capable of living alone, nor indeed has the courage to do it (*i*); and it being impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, forming separate states and nations, entirely independent of each other, and yet enjoying a mutual intercourse. Hence arises a second kind of law to regulate

(*h*) "*Juris præcepta sunt hæc, honestè vivere, alterum non lædere, suum cuique tribuere.*"—Inst. l. 1, 3. The word *honestè* in this passage has been rendered by Blackstone, vol. i. p. 40, *honestly*, which scarcely conveys the full meaning.

(*i*) Puffendorf, l. 7, ch. 1, compared with Barbeyrac's Commentary.

this mutual intercourse, called "the Law of Nations,"—and which the civil law calls the *jus gentium* (*k*).

And having premised thus much concerning the law of nature and the law of nations, there remains to be considered (and at much greater length) the municipal law, being the rule by which particular nations are governed; and a *municipal* law may be defined as being "a rule of civil conduct prescribed by the supreme power in a state" (*l*). And, first, it is a *rule*,—not a transient particular order, but something permanent, uniform, and universal (*m*). For example, a particular Act of Parliament to confiscate the goods of A., is rather a sentence than a law, being exhausted upon A.; but an Act to declare that a certain crime of which A. is accused is or shall be deemed high treason is properly a rule or law, being permanent and universal and also uniformly compulsory. And it is called a rule, to distinguish it from a *compact* or *agreement*,—the language of a compact being "I will, or will not do this"; while the language of a law or rule is, "thou shalt, or shalt not, do it."

Municipal law is also "a rule *of civil conduct*,"—as distinguished from a rule of morals or of faith; for municipal law regards man as a citizen, and as being bound towards his neighbour in other duties than those of mere nature and religion.

Municipal law is also "a rule *prescribed*,"—a bare resolution confined within the breast of the legislator not being properly a law; for it is requisite that the resolution shall be notified (that is to say, prescribed), to the people who are to obey it. But the manner in which this notification is to be made, is matter of indifference; for the rule may be notified by universal tradition, which supposes a previous publication, and is the case with the common

(*k*) Ff. l. 1, 9.

(*l*) "*Jus civile est quod quisque sibi populus constituit.*"—Inst. l. 2, 1.

(*m*) An order affecting certain individuals only was, by the Roman jurists, termed *privilegium*. See Austin on Jurisprudence, vol. i. p. 13.

law of England ; or it may be notified *vivâ voce*, by officers appointed to proclaim it ; or, lastly, it may be notified by writing, printing, or the like,—which is the general course in the case of Acts of Parliament. But the notification must be in the most public and perspicuous manner ; and thereupon it is the subject's business to be acquainted with it.

Further, the municipal law is "a rule of civil conduct prescribed *by the supreme power in a state*,"—legislature being the greatest act of superiority that can be exercised by one over another or others ; and it is requisite to the very essence of a law, that it be made by the supreme power. And this leads us to enquire concerning the nature of society and of civil government. Now the only true and natural foundations of society are (or rest in) the wants and fears of individuals,—single families having first formed a natural society among themselves, which, every day extending its limits, passed gradually into a civil or political society ; which, when it grew too large to subsist with convenience as one society or state, necessarily subdivided itself into more.

And when civil society is once formed, government results of course, as necessary to keep that society in order; for unless a superior be constituted, whose commands and decisions all the members shall obey, they would still remain as in a state of nature. But in what way this superior was to be constituted,—or (in other words) in what way the several forms of government which we now see in the world at first actually began,—is a matter of great uncertainty, and has occasioned infinite disputes.

The political writers of antiquity allow only three regular forms of government ; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy ; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy ; the last, when it is entrusted in the hands

of a single person, and then it takes the name of a monarchy ; and all other species of government, they say, are either corruptions of, or reducible to, these three.

In a democracy, where the right of making laws resides in the people at large, public virtue or goodness of intention is (it has been said) more likely to be found, than in either of the other qualities of government ; for although popular assemblies are frequently foolish in their contrivance, and weak in their execution, still they generally mean to do the thing that is right and just. In aristocracies, on the other hand, there is more wisdom (it has been said) but less honesty than in a republic, and less strength than in a monarchy,—a monarchy being the most powerful of any government. Again, it has been said, that democracies are the best calculated to direct the end of a law ; aristocracies to invent the means by which that end shall be obtained ; and monarchies to carry those means into execution ; and Cicero was of the opinion that a mixture of all three was better than any or either of them singly (*n*), while Tacitus treated the notion of such a mixture as a visionary whim, and a mixed government (he said) could never be either lasting or secure (*o*). But, happily for us, the mixed government which Tacitus ridiculed is both a possible and a lasting government ; and according to the British constitution, the executive power is lodged in a single person, while the legislative power is committed to the sovereign, the lords spiritual and temporal, and the commons,—three bodies constituting one aggregate body, in which is lodged the sovereignty.

Whatever the form of government, and wherever the supreme authority resides, it is the right of that authority to make laws,—or, in the words of our definition, *to*

(*n*) In his fragments De Rep. l. 2.

(*o*) "*Cunctas nationes et urbes populus, aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.*"—Ann. lib. iv. ch. 33.

prescribe the rules of civil conduct; and this follows from the very end and institution of a state. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man; and in order to act as one man, the state must act by one uniform will,—wherefore all the individual citizens submit their private wills to the will of one man, or assemblage of men, to whom the supreme authority is entrusted; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be the *law*. And it is not merely the *right* of the supreme power to make laws; but it is its *duty* also to do so,—for the perpetual information and direction of all the individual citizens, in order that every man may know what to look upon as his own, and what to look upon as another's; and may know what is to be esteemed honest, and what dishonest or indifferent; and may know what degree he retains of his natural liberty, and what he has given up as the price for the benefits of society, and so forth.

Municipal law is either *declaratory*,—whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down; or is *directory*,—whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs; or is *remedial*,—whereby a method is pointed out to recover a man's private rights, or to redress his private wrongs; and to these may be added—in the case of a law by which any public wrong is prohibited, or public duty enjoined—the part of the law which contains the *sanction* or provision for enforcing the observance of the law.

With regard to the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator; and has very little force or operation with regard to actions which (according to the law of nature) are essentially either right or wrong. But with regard to

things in themselves indifferent, the case is different—for these become either right or wrong, according as the municipal legislator deems proper for promoting the welfare of society, and the purposes of civil life.

The *directory* part of municipal law stands much upon the same footing as the declaratory part; and, in fact, the directory includes for the most part the declaratory, the declaration being usually collected from the direction. For example, the law that says "thou shalt not steal," implies a declaration that stealing is a crime.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be vague and imperfect without it. For in vain would rights be declared, and directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded.

With regard to the *sanction* of laws, it is observed, that human legislators have for the most part chosen to make sanctions rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in rewards,—the dread of evil being a much more forcible principle of human actions than the prospect of good (*p*).

Laws attended with a vindicatory sanction are said to *compel* and *oblige*,—not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty,—for rewards, in their nature, can only *persuade* and *allure*, nothing being *compulsory* save punishment.

(*p*) Locke on the Human Understanding, b. 2, ch. 2.

SECTION III.

OF THE LAWS OF ENGLAND.

BEFORE entering upon a consideration of the different parts of the law of England, a general account of the civil and canon laws may be desirable. Now, [by the *civil* law, is generally understood the municipal law of the Roman empire as comprised in the Institutes, the Code, and the Digests of the Emperor Justinian, and the Novel Constitutions of himself and of some of his successors ; and of this body of law, the following is a short and general account (*q*).

The Roman laws—founded, first upon the regal constitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors—had grown so greatly in bulk,—or, as Livy expresses it, "*tam immensus aliarum super alias acervatarum legum cumulus*" (*r*),—that they were almost impossible to either master or to harmonize,—an evil which was in part remedied by the collections of Gregorius, Hermogenes, and Papirius ; and latterly, by order of the Emperor Theodosius the younger, there was compiled in 438 A.D., a code or methodical collection of all the imperial constitutions then in force, and the Theodosian code was the only book of civil law for many centuries

(*q*) Ample information on this subject will be found in Vinnius on the Institutes, Voet on the Pandects, Perezius on the Code, and in the works of Bynkershoeck, Heineccius, and Pothier ; and their researches have been followed up by such modern writers as Kent, Hunter, and Savigny.

(*r*) L. 3, ch. 34.

after, received as authentic in the western part of Europe (*s*),—Justinian commanding only in the eastern portion of the empire ; and in or about the year 533, A.D., and by order of the last-mentioned emperor, the present body of the civil law was compiled, by the aid of Tribonian and others.

This consists of, 1, The Institutes, which contain the elements or first principles of the Roman law, in four books (*t*). 2. The Digests, or Pandects, in fifty books,—containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A New Code, or collection of imperial constitutions, in twelve books,—the lapse of a whole century having rendered the former code of Theodosius imperfect (*u*). And 4. The Novels, or new constitutions posterior in time to the other books, and amounting to a supplement to the code and containing the new decrees of the successive emperors, as new questions arose (*x*),—all which form the body of the Roman law, or *corpus juris civilis*.

[The *canon* law on the other hand is a body of Roman ecclesiastical law, relative to such matters as the church of Rome assumes jurisdiction over (*y*) ; and it is compiled

(*s*) This is at least true of the western part of Europe generally, as the code of Justinian was not recognised there generally till the twelfth century. But that code seems to have been recognized by the Roman Church, at least, much earlier. See Hallam's Mid. Ag. vol. iii. p. 513 ; and "Histoire du Droit Romain au Moyen-Age, par M. de Savigny," ch. xxii. ss. 164, 167.

(*t*) The Institutes of Justinian are chiefly founded on those of Gaius, and on the fragments of Ulpian. The manuscript of Gaius was discovered accidentally by Niebuhr, in the year 1816, while at work in the library at Verona.

(*u*) It is called the "New Code," not in reference to the Theodosian code, but to a code which was promulgated by Justinian, but suppressed by him on the publication of the New Code.

(*x*) It is remarked by Lord Mackenzie in his Studies on Roman Law (p. 25), that Justinian himself is the author of most of the Novels, viz., of 154 out of 168.

(*y*) A disquisition on this subject, including our national canon law, will be found in Reeves's Hist. Eng. Law, 4th vol. chapters xxiv., xxv.; and see Robertson's Chas. V. vol. i. n. 24.

[from the opinions of the antient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see ; all which lay in disorder and confusion, till, about the year 1151, Gratian, an Italian monk, in imitation of Justinian's Pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani* (*z*) ; and it embodied the constitutions down to the time of Pope Alexander the Third. The subsequent decrees down to the pontificate of Gregory the Ninth, were published under the auspices of that pope, in or about the year 1230, in five books, entitled *Decretalia Gregorii Noni* ; and a sixth book, called *Sextus Decretalium*, was added by Boniface the Eighth, in or about the year 1298. The Clementine Constitutions, or decrees of Clement the Fifth, were in like manner authenticated in 1317 by his successor John the Twenty-second, who also published twenty constitutions of his own, called the *Extravagantes Joannis*,—all which in some measure answer to the Novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes*: and all these together, Gratian's Decree, Gregory's Decretals, the Sixth Decretal, the Clementine Constitutions, and the Extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law. And besides these pontifical collections, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of our own church and kingdom (*a*),—the *legatine* constitutions having been enacted in *national* synods held under the Cardinals Otho and Othobon, legates of Gregory

(*z*) It is said by Dr. Burn, in the Preface to his "Ecclesiastical Law," p. xx., that the "decrees" of the canon law, having first been collected by *Ivo* in the year 1114, were afterwards "polished and perfected by Gratian, a monk of Bononia, in the year 1149."

(*a*) See Hist. Eng. Law, by Reeves, vol. ii. p. 78.

[the Ninth and Clement the Fourth, in the reign of Henry the Third, about the years 1220 and 1268 (*b*) ; and the *provincial* constitutions consisting principally of the decrees of *provincial* synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry the Third, to Henry Chichele, in the reign of Henry the Fifth, and which were adopted also by the province of York in the reign of Henry the Sixth (*c*).

Immediately prior to the Reformation of Religion, in the reign of Henry VIII., it was enacted by the 25 Hen. VIII. c. 19, revived and confirmed by 1 Eliz. c. 1, that a review should be had of the canon law, *and that, till such review should be made, all canons, constitutions, ordinances, and synodals provincial*, then already *made and which were not repugnant to the law of the land, or to the king's prerogative, should still be used and executed ;*] and inasmuch as no such review has yet been perfected (*d*), it would seem that upon this enactment depends to this day the authority of the canon law in England.

The limitations or restrictions subject to which the canon law is of force within this realm, appear upon the whole to be as follows,—that no canon contrary to the common or statute law, or to the prerogative royal, is of any validity ; and that, subject to that condition, the canons made anterior to the parliamentary provision above mentioned, so far as they had been then adopted into our system, are binding both on clergy and laity ; but that canons made since that period, as they have had no sanction from parliament, are, as regards the laity at least, of no force (*e*). And [accordingly, with regard to those

(*b*) On these constitutions Athon is the chief commentator. See Pref. to Burn's Ecclesiastical Law, p. xxii.

(*c*) *Ibid.* Lyndwode's Provinciale is the chief work of authority on the provincial constitutions. (See Reeves, vol. iv. p. 117).

(*d*) See Watson's Cl. Law, ch. iii. p. 17, 3rd ed.; Burnet's Hist. Reform., vol. ii. p. 197 ; Adams' Relig. World, vol. i. p. 411.

(*e*) See *Caudrey's Case*, 5 Rep. xxxii.; 12 Rep. 72 ; Co. Litt. 344a ; Pref. to Burn's Ecc. Law ; *Wolferstan* v. *Bishop of London*, 2 Wils.

[canons in particular which were enacted by the clergy in convocation under James the First, in the year 1603, and which were never confirmed in parliament, but sanctioned by the king's charter only (*f*), it has been solemnly adjudged upon the principles of law and the constitution, that (where they are not merely declaratory of the antient canon law, but are introductory of new regulations) they do not bind the laity, whatever regard the clergy may be bound to pay to them (*g*).]

We proceed now to consider the "municipal law of England," or the rule of civil conduct prescribed to the inhabitants of this kingdom ; and that law consists of two principal parts, namely, the *lex non scripta*, the unwritten (or common) law ; and the *lex scripta*, the written (or statute) law. But [with regard to the "unwritten" law, it is not to be understood that the whole of it is at present merely *oral ;* for although, in the profound ignorance of letters which formerly overspread the whole western world, all laws were at one time entirely traditional,—the British as well as the Gallic druids committing their laws as well as their learning to memory (*h*), and the primitive Saxons here, as well as their brethren on the continent, having done the like (*i*),—still with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts, and in the books of reports and judicial decisions, and in the treatises of learned sages

174; *Middleton* v. *Croft*, Stra. 1056; 2 Atk. 659, 669 ; *Alston* v. *Atlay*, 7 Ad. & El. 289.

(*f*) *Middleton* v. *Croft*, *ubi sup.* These are 141 in number, and are a collection out of the several preceding canons. They are intituled "Constitutions and Canons Ecclesiastical treated upon by the Bishop of London, President of the Convocation, &c., and agreed upon with the King's Majesty's Licence, in their Synod begun at London, A.D. 1603, in the first year of King James." They constitute the present standard of the Church of England.

(*g*) See *Middleton* v. *Croft*, *ubi sup.* ; *More* v. *More*, 2 Atk. 158 ; *Bishop of St. David's* v. *Lucy*, Carth. 485 ; *Rex* v. *Bishop of Lichfield*, 2 W. Bla. 968 ; *Marshall* v. *Bishop of Exeter*, Law Rep., 3 H. of L. Cas. 17.

(*h*) Cæs. de B. G. lib. 6, ch. 13.

(*i*) Spelm. Gl. 362.

[of the law, preserved and handed down to us from the remotest antiquity; which parts of our law are styled *leges non scriptæ*, because their original institution and authority were not set down in writing, as Acts of Parliament are; but they received the force of law, by long and immemorial usage, and by their universal reception throughout the kingdom.

Our antient lawyers, and particularly Fortescue (*k*), insist with abundance of warmth, that these customs are as old as the primitive Britons, and that they have continued down to the present time, unchanged and unadulterated; and this may be the case as to some; but the assertion (as observed by Selden) must be understood with many grains of allowance, and is merely intended to signify, that there never was any formal exchange of one system of laws for another. But doubtless the Romans, the Picts, the Saxons, the Danes, and the Normans, insensibly introduced and incorporated many of their own customs with those that were before established (*l*), improving thereby the texture of the whole.

And indeed our early historians do positively assure us, that our body of laws is of this compounded nature. For they tell us that, in the time of Alfred, the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile a *Dom-boc* or *Liber Judicialis*, digesting them into one uniform code of laws for the general use of the whole kingdom; and this book is said to have been extant so late as the reign of King Edward the Fourth, but to have been since lost; it probably contained the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings (*m*). But the irruption of the

(*k*) C. 17.

(*l*) Mr. Spence, in his "*History of the Equitable Jurisdiction of the Court of Chancery*," insists that the most important part of the common law is a legacy from the Romans.

(*m*) 1 Bl. Com. 65. In the opinion, however, of Mr. Hallam (Midd. Ages, vol. ii. p. 402, 7th ed.) there is no sufficient proof that Alfred "compiled a *dom-boc*, or general code for the government

[Danes introduced new customs; and about the beginning of the eleventh century, there were three systems of law prevailing in different parts of England, viz.:—1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and in those bordering on the principality of Wales, and which were therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon Lage*, or laws of the West-Saxons, which obtained in the counties to the south and west from Kent to Devonshire; and which were probably much the same with the laws of Alfred, being the municipal law of the most considerable part of his dominions, and which included Berkshire, the seat of his peculiar residence. And 3. The *Dane-Lage*, or Danish law, which principally prevailed in the rest of the midland counties, and also on the eastern coast, (the part of the realm which was most exposed to the visits of the Danes,) the very northern provinces being at that time under a distinct government (*n*).

Out of these three systems of law, Roger Hoveden and Ranulphus Cestrensis inform us, that King Edward the Confessor extracted one uniform law to be observed throughout the whole kingdom, the work having been begun by his grandfather King Edgar, and having been probably no more than a new edition, or fresh promulgation, of Alfred's code or Dom-boc, with such additions and improvements as the experience of a century and a half had suggested, Alfred being generally styled the *legum Anglicanarum conditor*, and Edward the Confessor the *restitutor*.]

of his kingdom." Turner (in his Hist. Ang.-Sax. vol. ii. p. 149, 6th ed.) considers the *dom-boc* as the same with the laws of Alfred, in the Leges Anglo-Sax. published by Wilkins. A document called "*Alfred's Dooms*" was printed by the Record Commissioners in 1840, but Sir F. Palgrave remarks, that it is insufficient to support the assertions of Blackstone as to Alfred's achievements as a law compiler (Rise, &c., of the British Commonwealth, ch. 11).

(*n*) 1 Bl. Com. 65. For this he cites Sir M. Hale, Hist. C. L. ch. 3.

Under the first princes of the Norman line, our ancestors were engaged in a frequent struggle to maintain certain institutions known by the appellation of the "laws of Edward the Confessor," and which would seem to have been a body of laws or customs observed (though not first established) in the reign of that monarch (*o*) ; and it is certain that the Norman princes made frequent engagements to restore and maintain these laws as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. And it is not unreasonable to believe that these, or some other remains of the law established in this country before the Conquest, gave rise (in part at least) to that collection of maxims and customs which is now known by the name of the common law (*p*), a name either given to it in contradistinction to other laws,—as the statute law, the civil law, the law merchant, and the like—or more probably, as a law common to all the realm.

To assign however to the common law no other original than this, would be to take an imperfect and erroneous view of the subject ; for our system of tenures was chiefly constructed, if not first founded, by the Norman conqueror (*q*) ; and our antient judicial forms and pleadings have nothing in common with the Anglo-Saxon style, and are in striking conformity with the Norman ; moreover, the general language of the law and the terms of art familiarly used therein are exclusively of French

(*o*) The laws so called, contained in Lambard and Wilkins, are considered spurious. (See Hallam's Mid. Ages, vol. ii. p. 444, 7th edit.)

(*p*) That much of our common law was in force in this island before the Conquest is maintained both by Hale and Blackstone. And the historian of the Middle Ages, though inclined in general to ascribe our common law to a date not much antecedent to the publication of Glanville (temp. Hen. 2), yet admits that "some features of "it may be distinguishable in "Saxon times." (Hallam, *ubi sup.*, pp. 466, 468, 7th ed.)

(*q*) 2 Bl. Com. 48 ; Henry, Hist. of Eng. vol. vi. pp. 10, 18 ; Hist. Eng. Law, by Reeves, vol. i. p. 28, 3rd edit. ; Hallam's Midd. Ages, vol. ii. p. 408.

extraction (*r*), so that we are bound to recognize in the antient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features (*s*).

But though these are the most likely foundations of the collection of maxims and customs which constitute the common law, yet these maxims and customs are of a higher antiquity than memory or history can reach (*t*), nothing being more difficult than to ascertain the precise beginning or first origin of an antient and long established custom. For which reason it is that, in our law, the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, "time whereof the memory of man runneth not to the contrary," —a phrase which in our law refers to a fixed era, and means that the custom must appear (for anything that can be proved to the contrary) to have been in use before the commencement of the reign of Richard the First (*u*).

[As regards those portions of the civil and canon laws which, by adoption into, have become parts of, our own law, these are properly ranked under the head of *leges non scriptæ* or unwritten laws; for although they are set forth

(*r*) "*Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine.*"—Craig, Jus Feud. lib. 1. s. 7.

(*s*) The similarity of the English and Norman laws is strongly illustrated by a comparison of the Grand Coustumier of Normandy (compiled as late as Ric. I. and probably later), with our Glanville, who wrote in the reign of Hen. II. This subject is discussed by Hale in Hist. C. L. ch. 6, who, jealous for the originality of the English law, argues from the posteriority in date of the Grand Coustumier, that, in most of the particulars where the conformity is to be traced, the merit of the first introduction presumably belongs to England, though he admits the reasonableness of assigning it in others to Normandy. It does not, however, seem very material in which of the two countries they were first established. They have at all events no resemblance to the Anglo-Saxon institutions, and are evidently due to lawyers of the Norman school.

(*t*) Hale, *ubi sup.* ch. 3.

(*u*) See the preamble to stat. 2 & 3 Will. 4, c. 71; Co. Litt. 116 a; *Jenkins* v. *Harvey*, 5 Tyrw. 396.

[in pandects, codes, and institutions, and are enforced by an immense number of expositions of the learned, still it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom : neither do their force and efficacy depend upon their own intrinsic authority,—which is the case with our written laws, or Acts of Parliament ; but all the strength which they obtain is only because by immemorial usage and custom they have been admitted and received, for when introduced by consent of parliament, they owe then their validity to the statute law which introduced them, and so become *leges scriptæ*.]

Our unwritten or common law is distinguishable into I. General customs, which are the universal rule of the whole kingdom ; and II. Particular customs, which affect only the inhabitants of particular districts.

I. [As to general customs, or the common law, properly so called, this is that law by which proceedings and determinations in the courts of justice are principally guided and directed ; this, for the most part, settles the course in which lands descend by inheritance ; the manner and form of acquiring and transferring property ; the solemnities and obligations of contracts ; the rules for expounding wills, deeds, and Acts of Parliament ; the respective remedies for civil injuries ; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires (*x*). Thus, for example, that the eldest son alone is heir to his ancestor ;—that a deed is of no validity unless sealed and delivered ;—that wills shall be construed more favourably, and deeds more strictly ;—these, and many others which might be instanced, are doctrines that are not set down in any written statute or ordinance ; but depend merely upon immemorial usage, that is, upon common law, for their support.

(*x*) Hale's Hist. C. L. ch. 2.

[Some have divided the common law into two principal grounds or foundations: viz., *customs* and *maxims*. But the authority of the maxims (such, for example, as "the king can do no wrong," "no man shall be bound to accuse himself," and the like) rests entirely upon general reception and usage, like customs do; also, the mode of proving a maxim to be a rule of the common law, is by showing that it hath always been the custom to observe it.

And here a very natural, and very material, question arises:—How are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges of the land,—they being the depositaries of the laws; the living oracles, who in all cases of doubt must decide according to the law of the land,—their knowledge of which is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions (*y*); and from being long personally accustomed to the judicial decisions of their predecessors; and indeed judicial decisions are the most authoritative evidence of the existence of the common law. The judgments themselves also, together with (until recently) the pleadings in the action (but which latter are now only filed), are carefully registered and preserved under the name of *records*, in public repositories set apart for that particular purpose (*z*); and to them frequent

(*y*) Cap. 8.

(*z*) As to records, see Co. Litt. 260 a, and the note by Mr. Hargrave. By the 1 & 2 Vict. c. 94, and 12 & 13 Vict. c. 101, s. 16, the public records of the kingdom are placed under the superintendence of the Master of the Rolls for the time being, and a Public Record Office has been established. To this office has also been transferred the whole of the deeds, books, documents, and papers belonging to the suitors in the Court of Chancery (40 & 41 Vict. c. 55; 61 & 62 Vict. c. 12), and which were formerly in the custody of the Masters in Chancery, and had meanwhile been transferred to the custody of the clerks of records and writs in the said Court (23 & 24 Vict. c. 149), —which clerks have now been transferred to, and their offices amalgamated with, the Central Office of the Supreme Court of Judicature, commonly called the Central Office (42 & 43 Vict. c. 78, ss. 4—6). Valueless documents may be destroyed: see 40 & 41 Vict. c. 55, and 61 & 62 Vict. c. 12.

[recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance (*a*). And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optimè instituti*" (*b*), while at the same time it has been uniformly considered to be the duty of those who administer the law, to conform to the precedents thus established,—*scil.*, because the scale of justice is not intended to waver with every new judge's opinion, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land. But if it be found that any former decision, *as reported*, is manifestly absurd or unjust, the judges will subsequently declare, not that such a sentence was *bad law*, but that it was *not law*.]

It is to be observed, however, that many specific questions are perpetually occuring, in which the rule of the common law does not happen to be fixed by any known decision, and that these are disposed of by the judges in the manner that they think most conformable to the received rule in other analogous cases ; or if there be no such analogy to guide them, then according to the natural reason of the thing ; though (in deference to the principle already referred to, that the opinion of the judge is not to make the law, but only to ascertain it) their determination always purports to be declaratory of what the law *is*, and not of what it *ought* to be ; and it is remarked by Sir Matthew Hale, that these new questions are much better dealt with by a judge, than they could be by a merely learned or wise man not belonging to the profession of the law,—*scil.*, because the latter might be incompetent to understand even the technical terms employed in the instrument to be expounded, and he would be unable to reason from the analogy of other decided cases (*c*) ; and,

(*a*) Order LXI. rr. 28, 29 (1883) ; Order LXII. r. 2 (July, 1894).

(*b*) Seld. Review of Tith. ch. 8.

(*c*) Hist. C. L. ch. 4.

even in questions which depend on reason only, the habit of solving them has an obvious tendency to improve the faculty,—for practice makes perfect, in this as in most other matters.

[The decisions of the courts are not only preserved as authentic records in the offices of the courts, but are also perpetuated in the numerous volumes of *Reports* which furnish the lawyer's library, these reports being histories or narratives of the several cases, with a short summary of the proceedings, (which used to be preserved at large in the record,) and of the arguments on both sides, and of the reasons the court gave for its judgment, taken down by persons of skill present at the determination. And these reports are extant in a regular series from the reign of King Edward the Second ; and from that reign down to the reign of Henry the Eighth inclusive, they were taken by the prothonotaries, or chief scribes of the courts, at the expense of the crown, and were published *annually*,—whence they are known under the denomination of the *Year Books* (*d*).] In the reign of the latter monarch, however, this series closed ; and though afterwards King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend to perform the same duty, that institution was soon neglected (*e*) ; and from the reign of Henry the Eighth, the task of communicating to the public the decisions of the courts has been left to private enterprise (*f*). Some of the most valuable of the

(*d*) The "Year Books" commence with the twentieth year of Edw. I., A.D. 1292.

(*e*) 1 Bla. Com. p. 72. In James the Second's time, an order was issued to the Stationers' Company, to the effect that all books concerning the common laws of the realm were to be *licensed* by the Lord Chancellor or the judges or one of them. (See 1 Ld. Raym. 537 ; Burr. pref.) But the judges afterwards came to a resolution to grant licences no longer.

(*f*) It may be here remarked that at the present time there are, and for some time have been, five series of reports of current decisions issued to the public, known respectively as the "Times Law Reports," the "Law Times Reports," the "Weekly Reporter" reports, the "Law Journal Reports," and "The Law Reports."

more antient reports are those by Lord Chief Justice Coke (*g*), a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works ; and his writings are so highly esteemed, that they are generally cited without the author's name, and simply as *the* Reports (*h*), or (as the case may be), *the* Institutes. Coke had been preceded as a reporter by Dyer and Plowden, both lawyers of the highest eminence ; and of his successors (too numerous for distinct notice,) we will mention only the more antient and distinguished such as Hobart, Croke, Yelverton, Saunders, Vaughan, and Levinz (*i*).

Besides the reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanville and Bracton, who in the reigns of Henry the Second and Henry the Third respectively wrote treatises on the laws of England ;

The reports last named are published for the Incorporated Council of Law Reporting for England and Wales, established in the year 1866 (see the case of the Incorporated Council of Law Reporting for England and Wales, 22 Q. B. Div. 279). There are also "The Revised Reports," an independent series only recently commenced.

(*g*) The first eleven parts only were published in Coke's lifetime, at various periods between 1600 and 1615,—the twelfth and thirteenth being posthumous.

(*h*) In quoting "the Reports," we usually say, 1 or 2 Rep., not 1 or 2 Coke's Rep. as in citing other authors. The Reports of Judge Croke are also cited in a peculiar manner, by the names of those princes in whose reigns the cases reported in his three volumes were determined, — *viz.* Queen Elizabeth, King James and King Charles the First ; as well as by the number of each volume ; and sometimes we call them 1, 2 and 3 Cro., but more commonly Cro. Eliz., Cro. Jac. and Cro. Car.

(*i*) The reports of Saunders were edited in 1799 by Mr. Serjeant Williams, a profound lawyer, who appended to them notes (or rather legal dissertations) of a very instructive character. His edition was afterwards republished by Sir John Patteson and Sir E. V. Williams (then both at the bar) as joint editors, and still more recently by Sir E. V. Williams alone, before his elevation to the bench ; and these editors added excellent annotations of their own to the former stock.

the author of Fleta, who composed a work on the same subject in the time of Edward the First (*k*) ; the author of the Mirror, a work generally ascribed to the reign of Edward the Second (*l*) ; Fortescue, who wrote De Laudibus Legum Angliæ in the reign of Henry the Sixth ; St. German, who composed the treatise on the grounds of the laws of England called the Doctor and Student, in the reign of Henry the Eighth ; Staundforde, whose work on the criminal law was published about the time of Philip and Mary, and who was followed in that track by Hale and Hawkins ; the author of Sheppard's Touchstone, who wrote on conveyances in the reign of James the First (*m*) ; Fitzherbert, Brooke, and Rolle, who published abridgments or digests of the different titles of the law in the reigns of Henry the Eighth, Elizabeth, and Charles the Second respectively, and whom Viner, Comyns, and Bacon afterwards succeeded (*n*) ; and Gilbert, among whose valuable works we shall only mention the treatise on tenures and that on uses and trusts (*o*). These and many other methodical writers are of high and intrinsic authority

(*k*) The author is unknown ; the title of the work is derived from its being written during the author's confinement in the Fleet Prison. Reeves's Hist. Eng. Law, vol. ii. p. 280. The work of Reeves just referred to (a production of our own times) is itself of high character, but less read perhaps than it deserves. Though its method is somewhat dry, its research and accuracy are exemplary ; and a continuation of it to the present day (if executed with equal ability) would be of great service to every student of law or constitutional history.

(*l*) The authorship and even the date of this treatise, "The Mirror of Justices," is uncertain. Some have pronounced it older than the Conquest, but it bears internal evidence of at least having been adapted to the time of Edward the Second. (See Reeves's Hist. Eng. Law, vol. ii. p. 358.) It is stated by Turner (Hist. Ang. Sax. b. i. ch. 3) to have been written by Andrew Horne, temp. Edw. 2.

(*m*) The work has been attributed to Doderidge, a judge of great eminence. See Pref. to Hilliard's edition.

(*n*) See Mr. Hargrave's eulogium on Viner's Abridgment, and Comyn's Digest, Co. Litt. 9 a, n. (3), 17 a, n. (1).

(*o*) Chief Baron Gilbert's Treatises were all published after the author's death, and in an unfinished state ; but they are of a most learned and useful character. As to his treatise on tenures, see Butler's Pref. to Co. Litt.

in the courts of justice: but none of the class shines so conspicuously as the learned judge before mentioned, Sir Edward Coke; who in the year 1628 published four volumes of Institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title (*p*). [The first volume of the Institutes, and which is usually cited as Co. Litt. or 1 Inst., is a very extensive comment upon an excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth; the second volume is a comment upon many old Acts of Parliament; the third is a treatise on the pleas of the crown; and the fourth is an account of the several species of courts.

And thus much for the first ground and chief corner-stone of the laws of England,—the old common law, consisting of general immemorial customs from time to time declared in the decisions of the courts; and a very considerable portion of which customs (it has been suggested) (*q*), is referrible to some positive enactment of the legislature, which has been long since lost and forgotten, being now preserved as custom only.]

II. The second branch of the unwritten law of England consists of *particular* (or *special*) customs affecting only the inhabitants of particular districts (*r*); and a custom of this kind it is usual to designate by the word *custom* simply, to distinguish it from the common law, or the *general* customs already spoken of.

[Such is the custom of *gavelkind* obtaining in Kent, and some other parts of the kingdom, which ordains, among other things, that not the eldest son only of the father succeeds to his inheritance, but all the sons alike (*s*); and

(*p*) See Butler's Pref. to Co. Litt., where the reader will find some valuable observations on the celebrated commentary on Littleton, of which the First Institute consists, and also on the original work of Littleton.

(*q*) See per Wilmot, C.J., *Collins* v. *Blantern*, 2 Wils. 351; Hale's Hist. C. L. ch. 4.

(*r*) Co. Litt. 110 b.; *vide sup.* p. 25.

(*s*) Co. Litt. 140 a.

[that, though the ancestor be attainted, yet the heir shall succeed to his estates, without any escheat to the Crown or to the lord (*t*). Such also is the custom that prevails in some antient boroughs, and therefore called *borough-English*, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such also are the customs of particular manors, of which every one hears more or less, and which bind all the copyhold and customary tenants that hold of the manor. Such, lastly, are many particular customs within the city of London, and other cities, with regard to trade, apprentices, widows, orphans, and a variety of other matters,—all which are more or less contrary to the general law, and are good only by special usage, though the customs have been also, in numerous cases, confirmed by Act of Parliament (*u*).] But the tendency of modern legislation, which is ever seeking to introduce simplicity or uniformity into the law, has been to abolish them ; and therefore we find that, *e.g.*, all the special customs of the city of London, and of the city of York, so far as they related to the distribution of the estates of intestates, have been for some long time abolished (*x*).

To this head has also sometimes been referred that branch of the law which comprises the rules relative to bills of exchange, partnerships, and other mercantile matters, and which body of rules is generally denominated the *custom of merchants* (*y*), or the law merchant. As its character, however, is not local, nor its obligation confined to any particular district, it cannot with propriety be considered as a special custom in the technical sense to which we now refer (*z*) ; and it is, in truth, a part of the

(*t*) The doctrine of escheat on a conviction for felony is, however, now abolished altogether. (See 33 & 34 Vict. c. 23, s. 1.)

(*u*) See the *City of London Case*, 8 Rep. 126; *The King* v. *Bagshaw*, Cro. Car. 347 ; see also Pulling on the Laws and Customs of London, p. 2.

(*x*) 19 & 20 Vict. c. 94.

(*y*) 1 Bl. Com. 75.

(*z*) Co. Litt. 115 b.

general law of England (*a*), distinguished specifically or by a separate name, only because it applies, to the particular subjects in question, principles more or less different from those which the common law ordinarily recognizes in other matters (*b*). The *usages of particular trades*, where not restrained to some particular locality, must also be excluded, and for the same reason, from the technical name of customs, for if there be any such usage of immemorial observance, and authenticated by judicial decision, it will form, according to our definition, part of the general law of England ; if there be any sanctioned by Act of Parliament, it will constitute part of the statute law ; but for the rest, the want of any peculiar *locality* determines these usages to be no customs, and they are consequently no rules of law at all. Yet, as matters of *fact*, these usages are very necessary to be considered ; for as the prevalence of any certain course of dealing among men leads to the presumption that in particular instances they intend to conform to it, the existence of such usages as these may often bear materially upon the question, whether an implied contract to the effect of the trade usage was not entered into between the parties (*c*).

The rules relating to particular or special customs regard either the *proof* of their existence, or their *legality* (or validity) when proved. And first, as regards the *proof* of the custom :—Of gavelkind and borough-English, the law takes notice ; and there is therefore no occasion to prove such customs, but only to prove that the lands in

(*a*) *Per* Holt, C.J., *Hussey* v. *Jacob*, Ld. Raym. 88 ; *per* Forster, J., *Edie* v. *East India Company*, 2 Burr. 1226 ; 1 Bl. Rep. 229, S. C. ; 2 Inst. 58 ; *Stone* v. *Rawlinson*, Willes, 561. See also *Benson* v. *Chapman*, 8 C. B, (N.S.) 967, *in notis*.

(*b*) The *lex mercatoria*, or *law merchant*, is mentioned in some of our earlier statutes. (See 27 Edw. 3, st. 2, cc. 8, 19, 20).

(*c*) *Seymour* v. *Bridge*, 14 Q.B.D. 460 ; *Perry* v. *Barnett*, 15 Q. B. D. 388 ; *Easton* v. *London Joint Stock Bank*, 34 Ch. Div. 95 ; S. C. (*sub. nom. Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Ca. 333.

question are subject thereto (*d*). But of all other special customs, the existence must be shown, and not merely that the thing in dispute is within the custom. [The trial in both cases—both to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to show, "that the lands in question are within that manor,"—is by a jury of twelve men, and not by the judges; unless the same custom has been before tried, determined, and recorded in the same court (*e*). But as regards the customs of London, these, so far as they continue, differ from all others in point of proof; for if the existence of the custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder (*f*); unless indeed it be such a custom as the corporation is itself interested in—as a right of taking toll—for then the law permits them not to certify on their own behalf (*g*).

Secondly, as regards the legality or validity of the custom when proved:—If any alleged custom is not a good custom, it ought to be no longer used, "*Malus usus abolendus est*" being an established maxim of the law (*h*).]

And for the purpose of ascertaining the validity or legality of a custom, the following rules are established:

1. The custom must have been *used so long, that the memory of man runneth not to the contrary.* Upon this subject, however, it is material to recollect what has been before laid down, that the time of memory as regards the validity of a custom, or (as it is sometimes expressed) the time of *legal* memory, has received a peculiar technical limitation, and refers to so remote a date as the commencement of the reign of King Richard the First (*i*). So

(*d*) Co. Litt. 175; Year Book, 36 Hen. 6, 20, 21; see Consuet. Kantiæ (17 Edw. 2, st. 1, c. 16).

(*e*) Dr. & St. 1, 10.

(*f*) *Appleton* v. *Sloughton*, Cro. Car. 516: *Westoby* v. *Day*, 2 Ell. & Bl. 605; *Cox* v. *Mayor of London*, 1 Hurls. & Colt. p. 356.

(*g*) *Day* v. *Savadge*, Hob. 85.

(*h*) Litt. § 212; 4 Inst. 274.

(*i*) Co. Litt. 115 a; *et vide sup.* p. 24.

that if an usage can be shown to have first commenced at any time since that era, it is void as a custom,—though, in the absence of such proof, its observance for a long time, and as far back as the evidence reaches, will amount to presumptive proof of its having prevailed during the whole period of legal memory (*k*). It is important also to bear in mind, that this principle, by which a custom is required to be immemorial, is materially qualified (in many cases) by the 2 & 3 Will. IV., c. 71, which, as to certain customary and prescriptive rights claimed in or out of or over the lands of other persons, (such as rights of common, or of way, and the like,) provides that these rights shall be deemed sufficiently established by proof of the uninterrupted enjoyment thereof *as of right* in some cases for thirty, in others for twenty years, and shall not be defeated (where such enjoyment can be proved) by showing merely that the enjoyment thereof commenced within the time of legal memory.

2. A custom must also have been *continued*,—*scil.*, because any interruption would cause a temporary ceasing thereof, and the revival of it would give it a new beginning, which would be *within* the time of legal memory. But this must be understood with regard to an interruption of the *right*; for a temporary interruption of the *possession* only will not destroy the custom (*l*). For example, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not exercise the right for ten years,—the right only becoming in such a case more difficult to prove: but if the *right* be anyhow discontinued, even for a day, the custom is quite at an end.

3. A custom must have been enjoyed *peaceably*, and not subject to contention and dispute (*m*). For customs derive their authority from their allowance, at some remote period, by common consent: and where the practice or

(*k*) *Rex* v. *Joliffe*, 2 Barn. & Cres. 54.

(*l*) Co. Lit. 114.

(*m*) *Ibid.*

usage has been immemorially disputed, the evidence of this consent is wanting (*n*).

4. [A custom must be *reasonable* (*o*) ; or rather, taken negatively, it must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law (*p*). Upon which account a custom may be good, though the particular reason of it cannot be assigned ; for it sufficeth if no good legal reason can be assigned against it. Thus, a custom in a parish that no man shall put his beasts into the common till the third of October, would be good ; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad : for peradventure the lord will never put in his, and then the tenants will lose all their profits (*q*).

5. A custom ought to be *certain* (*r*). A custom that lands shall descend to the most *worthy* of the owner's blood, is void ; but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good (*s*). A custom to pay two-pence an acre in lieu of tithes, is good ; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value (or even two years' improved value) for a fine on a copyhold estate, is good ; though the value is a thing uncertain,—*scil.*, because the value may at any time be ascertained, and *id certum est quod certum reddi potest.*

(*n*) *Vide sup.* p. 26.

(*o*) *Wilkes* v. *Broadbent*, 1 Wils. 63 ; *Marquis of Salisbury* v. *Gladstone*, 9 H. of Lords Cas. 692 ; *Sowerby* v. *Coleman*, Law Rep., 2 Exch. 96 ; *Hall* v. *Nottingham*, 1 Exch. D. 1 ; *Bradburn* v. *Foley*, 3 C. P. D. 129.

(*p*) Co. Litt. 62.

(*q*) Co. Coph. § 33

(*r*) 1 Roll. Abr. 565 ; *Selby* v. *Robinson*, 2 T. R. 758 ; *Steel* v. *Houghton*, 1 Hen. Bl. 51.

(*s*) Roll. Abr. *ubi sup.*

6. [A custom, though established by consent, must (when established) be *compulsory*, and not left to the option of every man, whether he may use it or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good ; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Customs must also be *consistent* with each other, and one custom cannot be set up in opposition to another (*t*). For if both are really customs, then both are of equal antiquity, and both are equally established by mutual consent,—which to say of contradictory customs is absurd.] Therefore if a man should allege that as a fisherman he is entitled, by the custom of a certain place, to dry his nets upon another's land,—which in favour of fishing and navigation is a reasonable usage,—the latter could not allege, in opposition to this, a right by custom to remove the nets when so placed,—for these two contradictory customs cannot both be good, nor both stand together (*u*). But one custom may be subordinate to, and therefore controlled by, another custom,—in which case, both the customs may well stand together ; and where it is possible to do so, customs that are apparently in conflict, must be read so as to stand consistently together (*x*).

8. [A custom, being in derogation of the general law, must be construed *strictly* (*y*). Thus, by the custom of gavelkind, an infant of fifteen years may by one species of conveyance, (namely, a deed of feoffment,) convey away his lands in fee simple ; but that does not empower him to use any other conveyance,—for the custom must be strictly pursued ;] and yet if there be a custom that a man may convey his copyhold in fee simple, this will enable

(*t*) *Aldred's Case*, 9 Rep. 58 b ; *Parkin* v. *Radcliffe*, 1 Bos. & Pull. 282.

(*u*) 1 Roll. Abr. 560 ; *Hickman* v. *Thorne*, 2 Mod. 104.

(*x*) *Bateson* v. *Green*, 5 T. R. 411 ; Scriven on Copyholds, 7th ed, p. 314.

(*y*) *Arthur* v. *Bokenham*. 11 Mod. 161 ; *Denn* v. *Spray*, 1 T. R. 466.

him to convey for life, or any other estate,—for the less is implied in the greater ; and though customs must be strictly, yet they need not in every case be literally, construed (*z*).

9. Lastly, it is to be understood that no custom can prevail against an express Act of Parliament (*a*).

We will now proceed to the *leges scriptæ*, or written laws of the kingdom, being the statutes of the realm, and made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled (*b*), and the oldest of which now extant and printed in our statute books is the famous *Magna Charta* of king John, as confirmed in parliament (*c*). And we propose to consider, firstly, the different kinds of statutes, and secondly, the rules applicable to their construction (*d*).

(*z*) Co. Cop. § 33.

(*a*) Co. Litt. 113 a ; *Noble* v. *Durell*, 3 T. R. 271.

(*b*) *The Prince's Case*, 8 Rep. 20.

(*c*) 25 Edw. 1. The statutes from Magna Charta down to the end of Edw. 2—including also some which (because it is doubtful whether to assign them to the reign of Hen. 3, of Edw. 1, or of Edw. 2) are termed *incerti temporis*,—compose what have been called the *Vetera Statuta* ; the statutes from the beginning of the reign of Edw. 3 being called the *Nova Statuta*. And here it may be observed, that by a long succession of statutes commencing with the 19 & 20 Vict. c. 64, and ending (so far) with the 61 & 62 Vict. c. 22, and which are commonly referred to as the Statute Law Revision Acts,—a variety of Acts not in use or otherwise spent, have been repealed ; also, that with a view to shortening the language of Acts of Parliament, various provisions are contained in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), giving to short expressions (such as "Board of Trade," "High Court," &c.) the full effect of the longer expressions or descriptions formerly in use, and providing for the omission of the enacting words customarily repeated at the beginning of each section of the act.

(*d*) The method of citing Acts of Parliament has been various, the antient ones being sometimes called after the name of the place where the Parliament was held that made them (*e.g.*, the statutes of Merton, of Westminster, of Gloucester), and being sometimes named after their subject (*e.g.*, the statute *de prærogativa regis*), and others being distinguished by their initial words (*e.g.*, the statute of *Quia emptores*). But the most

Firstly, statutes are either *public* or *private* (*e*). Thus, the statute 13 Eliz. c. 10, which prohibits the master and fellows of any college, the dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years or three lives, is a public act (*f*), being a rule prescribed to spiritual persons in general: but an act to enable the Bishop of Chester to make a lease to A. B. for sixty years concerns only the parties and the bishop's successors, and is therefore a private act. Again, of private acts, some are *local*, as affecting particular places only; others *personal*, as confined to particular persons (*g*); and of the first kind, an inclosure act is an example; of the second, an act for a change of name. But with regard to the distinction between public and private statutes, the courts were always bound to take notice judicially of the former, although not of the latter; but, now, by the 52 & 53 Vict. c. 63, repealing (but re-enacting the like provision contained in the 13 & 14 Vict. c. 21) every statute made after the year 1850 is to be taken to be a public one, and judicially noticed as such, unless the contrary is expressly provided by the act (*h*).

Statutes are also sometimes described as *declaratory*, or

usual method has been to cite them by the year of the reigning sovereign and the chapter, as, 9 Geo. 2, c. 4,—all the Acts of *one session* of parliament taken together making properly but *one statute*,—so that when two sessions are held in one year, we usually say stat. 1 or 2, the Bill of Rights, *e.g.*, being cited as 1 W. & M. st. 2, c. 2. However, it is now usual to insert in the Act a name referring to its subject-matter and date by which it shall be sufficient to cite it, *e.g.*, "The Public Health Act, 1875," —a method of citation which has been recognised by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), and also largely extended retrospectively by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), repealing (but re-enacting with certain amendments) the Short Titles Act, 1892 (55 & 56 Vict. c. 10).

(*e*) *Cromwell's Case*, 4 Rep. 13 a; *Holland's Case*, *ib.* 76 a; *Kirk* v. *Nowill*, 1 T. R. 125; *Samuel* v. *Evans*, 2 T. R. 569.

(*f*) *Holland's Case*, 4 Rep. 76 a.

(*g*) *Barnett* v. *Cox*, 9 Q. B. 617.

(*h*) *Chorlton* v. *Lings*, Law Rep., 4 C. P. 374.

penal, or *remedial*, according to the different nature of their objects or provisions. *Declaratory* statutes are where, the old custom of the kingdom being almost fallen into disuse, or become disputable, the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been ; *e.g.*, the statute of treasons, 25 Edw. III. st. 5, c. 2, which did not make any new species of treasons, but only (for the benefit of the subject) declared and enumerated those several kinds of offences, which before were treason at the common law. *Penal* acts are those which impose penalties or punishments for an offence committed ; *e.g.*, the statutes relative to game. *Remedial* acts are such as supply some defect in the existing law, or redress some abuse with which it is attended ; *e.g.*, the statute 3 & 4 Will. IV. c. 105, which introduced various improvements in the law relating to dower. But some statutes combine more than one of these objects, while others have objects of a different description ; and some statutes are of a more general character than others,—wherefore some are called *general*, and others are called *particular* statutes. There is also a distinction between Acts of Parliament, as being either *enlarging* or *restraining*, *enabling* or *disabling* ; *e.g.*, the 32 Hen. VIII. c. 28, which gave bishops and other sole ecclesiastical corporations (except parsons and vicars) a more ample power of making leases than they possessed before, is called an enabling statute : and the 13 Eliz. c. 10 which afterwards imposed certain limitations as to the making of leases by ecclesiastical persons, is called a disabling statute (*i*).

Secondly, the rules applicable to the construction of statutes.—In interpreting statutes, the courts are governed by former adjudications (*j*), or, in the absence of these, by general reasoning (*k*). But there are also many specific

(*i*) Co. Litt. 44b ; 1 Bl. Com. 87.

(*j*) By Lord Kenyon, *Lacon* v. *Hooper*, 6 T. R. 224 ; and see *Rex* v. *Leek Wootton*, 16 East, 122.

(*k*) Hob. 346.

rules for the interpretation or construction of statutes ; and principally these which follow :—

1. A statute operates from the time when it receives the royal assent, unless some other time be fixed by the act itself for the purpose (*l*). The rule on this subject was formerly different ; for at common law every Act of Parliament, which had no provision to the contrary, was considered, as soon as it passed, as having been in force retrospectively from the first day of the session of parliament in which it passed, though in fact it might not have received the royal assent, or even been introduced into parliament, until long after that day (*m*). This strange principle, however, though rigidly observed for centuries, no longer prevails ; it having been expressly provided by 33 Geo. III. c. 13, that where no other period for the commencement of the statute is provided by the statute itself, every statute shall be considered as commencing from the date indorsed upon it as the date of its receiving the royal assent—a manifest improvement, it must be owned, on the former law; though it has been doubted (and with reason) whether even the new rule is placed upon the right basis, and whether some fixed and reasonable period ought not always to be interposed between the passing of an act and the time of its coming into operation, so as to give the subjects of the realm an opportunity of becoming acquainted with its provisions (*n*).

2. Statutes are to be construed not according to the letter, but according to the true intent and object with which they were made (*o*). It occasionally happens therefore that the judges who expound them are obliged, in

(*l*) *Nares* v. *Rowles*, 14 East, 510; *Tomlinson* v. *Bullock*, 4 Q. B. D. 230.

(*m*) *Latless* v. *Holmes*, 4 T. R. 660.

(*n*) See Kent's Comm. Lect. 20; Dwarris on Stats. 683 ; and upon the retrospective construction, see *Burn* v. *Carvalho*, 1 Ad. & El. 338 ; *Hitchcock* v. *Way*, 6 Ad. & El. 943 ; *Moon* v. *Durden*, 2 Exch. 22 ; *Wright* v. *Hale*, 6 H. & N. 229.

(*o*) Bac. ab. Statute (1), 5 ; *Stradling* v. *Morgan*, Plow. 205 ; *Rex* v. *Everdon*, 9 East, 101.

favour of the intention, to depart in some measure from the words; and that either by holding that a case apparently within the words, is not within the meaning, or that a case apparently not within the words, is within the meaning. Thus, where a statute provided that all who should commit a certain act should be deemed felons, yet a madman who did the act would not be deemed a felon,—for that would be contrary to the presumable intention, such a case not being within the *equity* of the statute (*p*); and conversely, where an Act of Parliament gave the owners of inheritances a remedy by action against such tenants holding for life or *years* as should commit waste, the action was held maintainable against a tenant holding only for one year or less,—for so the law-makers presumably designed, such a case being within the *equity* of the statute (*q*). It is to be observed, however, that this principle of *equitable* construction is not to be carried beyond certain bounds, and a judge is not at liberty, in favour of a supposed intention, to disregard the express letter of the statute, where, for any thing that appears, the wording may correspond with the actual design of the legislature—the maxim in cases of this description being that *a verbis legis non recedendum est* (*r*); and the rule or principle has been applied more freely to the antient statutes than it has been to those of more modern date, which latter are interpreted somewhat more strictly, and with closer adherence to the letter (*s*). For the style of framing Acts of Parliament has itself undergone a material change—those of a more antient era being comparatively short and general in their

(*p*) *Eyston* v. *Studd*, Plow. 465.

(*q*) Plow. 467; Co. Litt. 24 b. The term is of very early occurrence in our law (see Bract. lib. 1, ch. 4, p. 3 a; lib. 2, ch. 7, p. 23 b); Grotius de Æquitate, s. 3; Puffendorf, Elem. Jur. Un. lib. 1, ss. 22, 23; 3 Bl. Com. 431.

(*r*) *Edrick's Case*, 5 Rep. 118 b; *Jones* v. *Smart*, 1 T. R. 52; *R.* v. *Inhabitants of Great Bentley*, 10 Barn & Cress. 520.

(*s*) *Rex* v. *Gardner*, 6 Ad. & El. 118; *Rex* v. *Inhabitants of Barham*, 8 Barn. & Cress. 104; *Adam* v. *Inhabitants of Bristol*, 2 Ad. & El. 395, 399.

character, while the later acts are expanded into minute detail, and intended to reach every specific case ; and there is therefore now little, if any, room for the interpretation according to the equity of the statute ; and in fact such interpretation, as regards modern statutes, has been almost wholly discredited ; and the words themselves of the statute are now taken to express its real intention.

3. Another maxim (and one that may often serve for our guidance in the application of the last), is, that in the interpretation of statutes in general, the following points are to be considered,—the old law, the mischief, and the remedy ; that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief (*t*). For example, before the statute of 13 Eliz. c. 10, that is to say, by the common law, the master and fellows of a college might have let as long leases as they thought proper, and the mischief was that they let long and unreasonable leases, to the impoverishment of their successors ; and, accordingly, the remedy applied by that statute was to make void all leases made by them for longer terms than three lives, or twenty-one years. Now in the construction of this statute it was held, that leases, though for a longer term, made by the master and fellows of a college or a dean and chapter, were not void during the time of the master or of the dean,—*scil.*, because the act was made for the benefit and protection of the successor (*u*), and the mischief was therefore sufficiently suppressed by vacating them after the determination of the interest of the individual head of the corporation.

4. It is also an established rule, that remedial statutes

(*t*) *Heydon's Case*, 3 Rep. 7 ; 1 Bl. Com. 87 ; 2 Inst. 110 ; *Salmon* v. *Duncombe*, 11 Ap. Ca. 627.

(*u*) Co. Litt. 45, n. (4), by Harg. ; Bac. Ab. Leases (H.) ; *Magdalen College Case*, 11 Rep. 73 a ; *Magdalen Hospital* (*Governors*) v. *Knotts*, 5 Ch. Div. 175 ; 8 Ch. Div. 709 ; and 4 App. Ca. 324.

are to be more liberally, and penal statutes more strictly, construed (*x*). The statute of Elizabeth just mentioned may again serve as an example ; for, soon after it was made, the master and fellows of Magdalen College granted certain premises to the queen, her heirs, and successors, on condition that she should convey the same to a certain person named ; and it was contended that this conveyance was not restrained by the act,—for that, by the general rule of law, the sovereign is not bound by a statute unless specially mentioned, which the court admitted to be in many cases true ; but as this was a remedial act, it was adjudged that it should bind the queen (*y*). And in illustration of the stricter manner in which a penal act must be interpreted, we may refer to Lord Bacon, who said, that if for a certain offence it be enacted that a man shall lose his right hand, and some offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigns, than the letter of the law shall be extended (*z*) ; and this distinction applies not only to remedial and penal statutes properly so called, but also to those of a mixed kind, which contain both remedial and penal provisions (*a*).

5. In the construction of a statute, all other such statutes ought to be taken into consideration as have been made *in pari materiâ ;* and this rule applies whether the prior acts are referred to in the statute on which the question arises, or not,—for they are considered as all forming one continued enactment (*b*). Moreover, the *fasciculus* of connected statutes is subject to all the like rules of construction that are applicable to the construction of deeds

(*x*) 1 Bl. Com. 88.

(*y*) *Magdalen College Case*, 11 Rep. 72.

(*z*) Bac. Maxims, 12.

(*a*) *Platt* v. *Sheriffs of London*, Plowd. 36 ; *Bones* v. *Booth*, W. B. 1236.

(*b*) Bac. Abr. Statute (1), 2, 3 ; *Jones* v. *Smart*, 1 T. R. 53 ; King, *qui tam*, v. *Smith*, 4 T. R. 419 ; *Duck* v. *Addington*, 4 T. R. 447 ; *Gale* v. *Laurie*, 5 Barn. & Cress. 156 ; *Earl of Aylesbury* v. *Pattison*, 1 Doug. 30.

and ordinary written contracts, *e.g.*, such rules as have reference to controlling, in certain cases, the enacting (or operative) part by means of the preamble (or recitals) (*c*), and the rules for interpreting particular clauses in the document by reference to the context (*d*), and other like rules. But a *general* act will not be treated as repealing the specific restrictions contained in a *particular* act, unless it specifically repeals them (*e*). And as regards private Acts of Parliament, although the private act is obtained by an individual or individuals for his or their own individual advantage, while a public act is obtained by the public, and presumably therefore for the public advantage ; still there is no difference as regards the rules for their construction, and once that construction is arrived at, the consequences are precisely the same in the case of each (*f*). And upon the same principles of construction, the marginal notes annexed to the sections of an act (*g*), and the sub-headings under which the sections are sometimes grouped together (*h*), may be fairly considered in arriving at the true construction of the act,—as may also the title of the act (*i*).

6. A statute, which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior ; and therefore, inasmuch as the statute 13 Eliz. c. 10, before referred to, applied its prohibition to "masters and fellows of colleges, deans and chapters of

(*c*) *Danby* v. *Coutts*, 29 Ch. D. 500.

(*d*) *Bentley* v. *Rotherham Board of Health*, 4 Ch. D. 588 ; *Rex* v. *Pierce*, 3 M. & S. 62 ; *Salkeld* v. *Johnson*, 1 Hare, 196.

(*e*) *Thorpe* v. *Adams*, L. R. 6 C. P. 125 ; *Clements* v. *Ward*, 35 Ch. D. 589.

(*f*) *Altrincham Union* v. *Cheshire Lines Committee*, 15 Q. B. D. 597.

(*g*) *Venour* v. *Sellon*, 2 Ch. D. 525 ; *Sutton* v. *Sutton*, 22 Ch. D. 511.

(*h*) *Hammersmith Rail. Co.* v. *Brand*, L. R. 4 H. L. 171 ; and *Union Steamship Co.* v. *Melbourne Harbour*, 9 App. Ca. 365.

(*i*) *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1 ; and consider *Att.-Gen.* v. *Weymouth*, Amb. 22 ; *Jeffries* v. *Alexander*, 8 Ho. Lo. Ca. 603, n.

cathedrals, masters of hospitals, parsons and vicars, or any other having any spiritual or ecclesiastical living," a *bishop* was held not to be included within its provisions,—for, though he has a spiritual living, he is of higher dignity than any of the persons enumerated (*j*).

7. Where the provision of a statute is general, every thing necessary to make that provision effectual is supplied by the common law; and therefore, when anything is commanded or prohibited by an Act of Parliament, and no remedy for the breach is thereby expressly given, any party, who sustains a private injury from the breach, is entitled to bring his action for relief; and if the matter be of public concern, the offender shall besides be considered as guilty of a misdemeanor, and liable to indictment accordingly (*k*). The law in this case will be the same, even though the statute after the prohibition, proceeds by a separate clause to annex a particular pecuniary penalty to the offence if committed,—for that will not take away the other remedies (*l*); but where a statute merely inflicts a pecuniary penalty for an act not previously unlawful, and contains no direct prohibitory clause, the only remedy is to proceed for the penalty (*m*).

8. A subsequent statute may repeal a prior one, not only by express provision to that effect, but by necessary implication; and every statute is a repeal by implication of a preceding statute, so far as it is contrary thereto, for

(*j*) *Archbishop of Canterbury's Case*, 2 Rep. 46 b; 2 Hawk. ch. 27, s. 124.

(*k*) Bac. Abr. Statute (B); 2 Inst. 131, 163; *The Case of the Marshalsea*, 10 Rep. 75 b; 2 Hale, P. C. 171; *Rex* v. *Harris*, 4 T. R. 205; *Rex* v. *Leyinham*, 1 Mod. 71; *Carden* v. *General Cemetery Company*, 5 Bing. N. C. 253; *R.* v. *Badger*, 12 L. J. Q. B. (N.S.) 227.

(*l*) *Rex* v. *Harris*, 4 T. R. 205; *Beckford* v. *Hood*, 7 T. R. 620; *Rex* v. *Wright*, 1 Burr. 543; *Cooper* v. *Whittingham*, 15 Ch. D. 501; *Tottenham Local Board* v. *Rowell*, 15 Ch. D. 378; *Powell* v. *Fall*, 5 Q. B. D. 597.

(*m*) *Rex* v. *Buck*, 2 Str. 679; *Rex* v. *Wright*, *ubi sup.*; *Rex* v. *Robinson*, 2 Burr. 805; *Couch* v. *Steel*, 3 E. & B. 402; *Atkinson* v. *Newcastle, etc. Co.*, 2 Exch. Div. 441; *Ward* v. *Hobbs*, 4 App. Ca. 13.

leges posteriores priores abrogant (*n*) ; consonant to which it was laid down by a law of the Twelve Tables at Rome, that *quod populus postremum jussit id jus ratum esto.* But this is to be understood only when the matter of the later statute is so clearly repugnant that it necessarily implies a negative ; as if a former Act says, that a juror shall have an estate of twenty pounds a year ; and a new statute afterwards enacts, that he shall have twenty marks,—here the latter statute virtually repeals the former (*o*). But if the enactments are such that they may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy ; as if by a former law an offence be indictable at the quarter sessions, and a later law makes the same offence indictable at the assizes,—here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, unless the new statute adds express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere* (*p*).

9. It was formerly the rule, that if a statute, repealing another, was itself repealed afterwards, the first statute was revived, without any formal words for that purpose (*q*) ; but the rule in this respect was altered by the 13 & 14 Vict. c. 21, which enacted that where any act repealing in whole or in part any former statute was itself repealed, such last repeal should not revive the act or provisions before repealed, unless words were added for that purpose ; and that where any act was made repealing in whole or in part any former act, and substituting provisions instead of those repealed, such repealed provisions should remain in force till those substituted should come into operation

(*n*) Bac. Abr. Statute (D) ; *Paget* v. *Foley*, 2 Bing. N. C. 679 ; *Daw* v. *The Metropolitan Board of Works*, 12 C. B. (N.S.) 161 ; *Garnett* v. *Bradley*, 3 App. Ca. 944.

(*o*) Jenk. Cent. 2, 73.

(*p*) *Dr. Foster's Case*, 11 Rep. 63 ; *Conservators of the Thames* v. *Ball*, Law Rep., 1 C. P. 415 ; *Fitzgerald* v. *Champneys*, 2 J. & H. 31.

(*q*) *The Bishop's Case*, 12 Rep. 7 ; 4 Inst. 325 ; *Tattle* v. *Grimwood*, 3 Bing. 493 ; *Doe* v. *Gully*, 9 Barn. & Cress. 344 ; *Phillips* v. *Hopwood*, 10 Barn. & Cress. 39.

by force of the last made statute ; and although the 13 & 14 Vict. c. 21 has been repealed by the Interpretation Act, 1889 (*r*), the provisions of the repealed act in all these respects are re-enacted in the repealing act (*s*). And here we will observe, that it has become a very common thing in modern times to pass divers acts of a temporary duration only, and by subsequent acts (called Expiring Laws Continuance Acts) to continue their provisions for a further period (*t*).

10. [Acts of Parliament derogatory from the power of subsequent parliaments bind not. Accordingly, the statute 11 Hen. VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by Act of Parliament or otherwise, holds good only as regards common prosecutions for treason, but does not restrain or clog parliamentary attainders (*u*) ; for the legislature, being the sovereign power, is and always remains of equal authority.]

There is also a branch of the law called *equity*,—so called by way of distinction from the original and proper law of England, or (as it is usually called in this case) the *common law*. The antient structure of our law (whatever might be its merits in other particulars) was singularly defective in compass, and took no account of divers subjects for which it is the duty of the law to provide ; and to others, it applied maxims too strict and unbending to satisfy the notions of justice in an advanced state of society ; and its remedies also were in some cases inconvenient or limited. For these evils, a successive or progressive amendment of the law by statute would seem to have been the natural remedy ; but that was not the course in fact adopted, the law administered between subject and subject, in the antient courts of the realm, being allowed to remain for a long period of our history

(*r*) 52 & 53 Vict. c. 63.
(*s*) *Ibid.*, s. 11.
(*t*) 60 & 61 Vict. c. 54 ; 61 & 62 Vict. c. 47.
(*u*) 4 Inst. 43.

with very little alteration of a fundamental kind, and a new court being gradually established with a collateral, and in some sense, an usurped jurisdiction, in which cognizance was taken of those subjects which the common law of England had overlooked or insufficiently regulated; and the extensive subjects, in particular, of *trusts* and *partnerships*, fell almost exclusively within the jurisdiction of the new court,—which was subsequently called the High Court of Chancery. That court became also the proper and regular tribunal to which recourse was had, when the object was either to compel a man to specifically perform a contract into which he had entered, or to cause him to abstain from the commission of some specific injury,— the common law courts interfering in general only so far as to award *damages* where the breach of contract or the wrong had been already committed; and although their jurisdiction in this respect had been somewhat enlarged by the Common Law Procedure Act, 1854 (*v*), still it was not until the Judicature Acts, 1873 and 1875, that the two systems of law and equity came to be administered in the appropriate divisions of a single tribunal, constituted out of the superior courts of justice existing at the date of these acts, and styled Her Majesty's Supreme Court of Judicature; and by the Judicature Act, 1873, which came into force on the 1st November, 1875, it was provided, that in all matters in which there was any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity should prevail,—*scil.*, as regards principles and substantive law (*x*); for in matters of practice or procedure, the court is in the habit of adopting (in case of any conflict between law and equity) that procedure which is the more convenient of the two (*y*), all which will in due course hereafter more fully appear.

(*v*) 17 & 18 Vict. c. 125; *Norris* v. *Irish Land Company*, 8 Ell. & Bl. 526.

(*x*) 36 & 37 Vict. c. 66, s. 25 (11).

(*y*) *Thomas* v. *Palin*, 21 Ch. D. 360; *Jackson* v. *Litchfield*, 8 Q. B. D. 474.

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

By the common law, the municipal law of England does not extend to any place out of England, and therefore did not extend to Wales, Scotland, Ireland, Berwick-upon-Tweed, or any other part of the dominions of the Crown excepting England; nevertheless, by force of the statute law (*z*) the laws of England, or some of them, do now obtain, more or less, in all of these places,—of each of which it will be proper first to take a review, before we consider the Kingdom of England itself, the original and proper subject of these laws.

[And, first, of Wales:—For many centuries after its invasion by the Romans, Wales remained independent of England, and in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general (*a*); and in the time of the Saxons, the antient inhabitants of the island retired to its natural intrenchments, for protection against their hostile visitants. But when these invaders themselves, who in the meantime had been converted to Christianity, settled down under regular governments, they gradually drove the antient Britons into a narrower territory, pursuing them from one fastness to another, and eventually abridging them of their independence. Very early in our history, we find their princes doing homage to the crown of England; till at length in the reign of Edward the First, who may justly be styled the conqueror

(*z*) 1 Bl. Com. p. 93.

(*a*) As to Wales, see Vaugh. 395–420; *Rex* v. *Cowle*, 2 Burr. 850; 2 Inst. 195; 4 Inst. 239; *Buckley* v. *Thomas*, Plowd. 121, 123, 126, 129.

[of Wales, the line of their antient princes was abolished (*b*), and the king of England's eldest son was created their titular prince (*c*),—the territory of Wales being then, by a species of feodal resumption, re-annexed to the dominion of the crown of England (*d*),—or, as the statute of Wales (12 Edw. I.) expresses it, "*terra Walliæ cum incolis suis, "prius regi jure feodali subjecta, jam in proprietatis "dominium totaliter et cum integritate conversa est, et coronæ "regni Angliæ tanquam pars corporis ejusdem annexa et "unita*" (*e*). By other subsequent statutes, their immunities were still farther abridged: and the finishing stroke to their independence was given by the statute 27 Hen. VIII. c. 26 (as confirmed and enlarged by the statute 34 & 35 Hen. VIII. c. 26), by which statute the people of Wales were admitted to a thorough communication of laws with the people of England,] the statute enacting (amongst other matters of less importance),—1. That the dominion of Wales shall be for ever united to the kingdom of England; 2. That all Welshmen born shall have the same liberties as other the king's subjects; 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent; 4. That the laws of England, and no other, shall be used in Wales; and 5. That Wales shall be divided into twelve counties or shires, exclusive of the county of Monmouth, which is made one of the counties of England.

[From the time of Hen. VIII., therefore, the civil condition of the principality has differed but slightly from that of England; and it may be remarked, that an Act of Parliament, where England only is mentioned, now includes Wales also (*f*). Wales, however, for a long time

(*b*) See Turner's Hist. Eng. p. 3, ch. ii.

(*c*) Blackstone says he became "their titular prince as a matter of course;" but the expression is not accurate; as the title of Prince of Wales is always conferred on the heir apparent by special creation and investiture.

(*d*) Vaugh. 400; *Rex* v. *Cowle*, 2 Burr. 851.

(*e*) 12 Edw. 1.

(*f*) 20 Geo. 2, c. 42, s. 3.

[possessed within itself superior courts called Courts of Great Session, independent of the process at Westminster Hall, and was not visited by the English judges of assize : also, such of the counties and towns of Wales as were represented in parliament sent each one member only, while the usual number in England was two.] But, in 1831, by the 11 Geo. IV. and 1 Will. IV. c. 70, the jurisdiction of these Courts of Great Session was abolished, and assizes were directed to be held in Wales for the trial of all matters civil and criminal, in like manner and form as had been usual for the counties in England ; and in 1832, by the 2 & 3 Will. IV. c. 45, a new arrangement was made as to the return of members of parliament for Wales,—by the effect of which, three of its counties used thereafter respectively to send two knights of the shire to parliament, and each of the remaining counties one ; and under the Representation of the People Act, 1884 (*g*), and the Redistribution of Seats Act, 1885 (*h*), Wales is now placed upon a similar footing to England as regards representation in parliament.

[Secondly, as regards Scotland :—The kingdom of *Scotland*—notwithstanding the union of the crowns on the accession of James the sixth of Scotland and first of England—continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected ; which union was judged to be the more easy to be effected, as these kingdoms exhibited at the time of the project a very great resemblance in their institutions ; and this is remarked by Sir Edward Coke (*i*), who points out a conformity, in many things, not only in the religion and language of the two nations, but also in their antient laws. As to the latter particular, indeed, this resemblance did not exist at the time of the Norman conquest, for the Scottish institutions were then, according to the best authorities, exclusively Celtic, and those of

(*g*) 48 Vict. c. 3.
(*h*) 48 & 49 Vict. c. 23.
(*i*) 4 Inst. 345.

[England, Anglo-Saxon (*k*) ; but the resemblance became established as soon afterwards as the twelfth century (*l*) ; and it continued to prevail at the time of the Union ; but there was always a great diversity in the practice of the law ; and owing, most probably to the antient alliance and connection of Scotland with France, where the civil law prevailed, the Scotch law, particularly in all that regards contracts and commerce, still presents a striking conformity with the Roman law, excepting where modern legislation and English influences have concurred in modifying it (*m*).

All difficulties in the way of the union of the two kingdoms, whether arising from their diversities of law or from other occasions, being in due course overcome, the union of the two countries was effected in the year 1706, during the reign of Queen Anne, by a statute commonly called the Act of Union (*n*), by which twenty-five articles were agreed to by the parliaments of both nations, and the most considerable of which were as follows :—

1. On the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain (*o*) ;

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England ;

(*k*) See Hallam's Constitutional Hist. vol. iii. p. 404, 3rd ed.

(*l*) The most antient book of Scottish law, called *Regiam Majestatem* (the authenticity of which, though once a subject of dispute, seems on the whole to be sufficiently established), is so similar to the treatise of Glanvil on English law in the reign of Hen. 2, that one of them is plainly copied from the other ; but there is no reason to doubt that Glanvil's is the original work. See Erskine's Instit. b. 1, t. 1, s. 32 ; Hist. Eng. Law, by Reeves, vol. i. p. 225.

(*m*) See Erskine's Instit. b. 1, t. 1, s. 41.

(*n*) The Act of Union (6 Ann. c. 11) is sometimes printed 5 & 6 Ann. c. 8.

(*o*) We may here remark that by 4 & 5 Vict. c. 30, and 33 & 34 Vict. c. 13, an ordnance *survey* of Great Britain, and by 8 & 9 Vict. c. 63, and 14 & 15 Vict. c. 42, a *geological* survey of the United Kingdom, were authorized to be taken.

[3. The United Kingdom shall be represented by one parliament (*p*) ;

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed ;

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.* ;

16, 17. The standards of the coin, and of weights and measures, shall be reduced to those of England, throughout the united kingdom (*q*) ;

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England (*r*), all the other laws of Scotland, nevertheless, remaining in force, though alterable by the parliament of Great Britain,—such of these laws as relate to public policy being alterable at the discretion of such parliament, and such of them as relate to private rights not being alterable save for the evident utility of the people of Scotland ;]

22. Sixteen peers were to be chosen to represent the peerage of Scotland in parliament (*s*), and forty-five members to sit in the house of commons ; which number of commoners was, however, afterwards raised to sixty (*t*), and has now been raised to seventy-two (*u*) ; and

23. [The sixteen representative peers of Scotland shall have all the privileges of parliament : and all peers of Scotland shall be peers of Great Britain, ranking next after those of the same degree at the time of the union ; and

(*p*) There is an appellate jurisdiction in the House of Lords over the Scotch courts in civil cases, as to which see 6 Ann. c. 53 ; 48 Geo. 3, c. 151 ; and 39 & 40 Vict. c. 59, s. 3 ; and (as to the court of *Justiciary*) *Mackintosh* v. *The Lord Advocate*, 2 App. Ca. 41.

(*q*) Art. 17 of the Act of Union was repealed by 41 & 42 Vict. c. 49.

(*r*) *Maxwell* v. *Mayre*, 1 Bla. Rep. 271.

(*s*) 6 Ann. c. 78 ; 2 & 3 Will. 4, c. 63 ; 10 & 11 Vict. c. 52 ; 14 & 15 Vict. c. 87.

(*t*) 2 & 3 Will. 4, c. 65 ; 31 & 32 Vict. c. 48.

(*u*) 48 Vict. c. 3 ; 48 & 49 Vict c. 23.

[shall have all the privileges of peers, except sitting in the House of Lords and voting on the trial of a peer (*x*).

These are the principal of the twenty-five articles of union, which were ratified and confirmed by the Act of Union, 6 Anne, c. 11 : in which statute there were also two acts of parliament recited, namely, one of Scotland (*y*), whereby the church of Scotland, and also the four universities of that kingdom, were established for ever, and all succeeding sovereigns were required to take an oath inviolably to maintain the same ; and the other of England (*z*), whereby the Acts of Uniformity of the thirteenth year of Elizabeth and the thirteenth and fourteenth years of Charles the Second (except as the same had been altered by parliament at that time), and all other acts then in force for the preservation of the Church of England, were declared perpetual ; and it was stipulated, that every subsequent king and queen should take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed ; and the Act of Union expressly and particularly enacts that these two acts "shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles and Act of Union, it is to be observed (*a*)—1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be

(*x*) *Lord Mornington's Case*, Fort. Rep. 165 ; *Duke of Queensberry's Case*, 1 Peere Wms. 582.

(*y*) 1 W. & M. c. 5.

(*z*) 5 Ann. c. 5.

(*a*) Some alteration in the Act of Uniformity was effected by "The Universities Tests Act, 1871" (34 & 35 Vict. c. 26) ; and the liturgy of the Church of England was changed, in certain particulars, by "The Prayer Book (Tables of Lessons) Act, 1871" (34 & 35 Vict. c. 37) ; and by the 22 Vict. c. 2, the church services for some particular days have been abolished,—but none of these alterations are fundamental.

[" fundamental and essential conditions of the union." 2. That whatever else may be deemed " fundamental and essential conditions," the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the Acts of Uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these " fundamental and essential conditions." 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament ; and, as the parliament has not yet thought proper, except in certain instances, to alter them, they still (with regard to the particulars unaltered) continue in full force.] Wherefore the municipal laws of England are, generally speaking, of no force or validity in Scotland ; nor, on the other hand, are those of Scotland of force or validity in England (*b*) ; and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any further than sometimes by way of illustration, the municipal laws of the Scottish part of the United Kingdom. It is however to be observed that Acts of Parliament, passed since the union, extend in general to Scotland, though that country be not expressly mentioned ; and if it is intended to except Scotland, there must be an express proviso to that effect, or the intention of the

(*b*) Our courts do not even take judicial notice of the state of the law in Scotland ; but (as in the case of a foreign country) if any question upon it happens to arise, it is considered as a matter of *fact* to be ascertained by evidence. (See *Woodham* v. *Edwards*, 5 Ad. & El. 771 ; *Bradlaugh* v. *De Rin*, Law Rep., 5 C. P. 473.) Nevertheless, a great comity of legal intercourse prevails between Scotland and England, especially since the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31).

legislature to except it must be otherwise sufficiently indicated (*c*). It is true, that a separate secretary of state for Scotland has been recently appointed (*d*), but only for the more convenient management of the business of the two countries, regarded as one united kingdom (*e*).

[Thirdly, as regards the town of *Berwick-upon-Tweed* :— This town was originally part of the kingdom of Scotland ; but it was for a time reduced by King Edward the First into the possession of the crown of England ; and, during such its subjection, it received from that prince a charter, which, (after its subsequent cession by Edward Balliol to be for ever united to the crown and realm of England,) was confirmed by King Edward the Third, with some additions ; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward the First. Its constitution was, however, remodelled and put upon an English footing by a charter of King James the First, and its liberties, franchises, and customs were confirmed in parliament by the statute 2 Jac. I. c. 28, apparently following an earlier statute 22 Edw. IV. c. 8 ; and although therefore it hath some local peculiarities, derived from the antient laws of Scotland, yet it is now clearly part of the realm of England (*f*) ; and by the 20 Geo. II. c. 42, s. 3, where England only is mentioned in any Act of Parliament, the same notwithstanding comprehends and includes the town of Berwick-upon-

(*c*) *Rex* v. *Cowle*, 2 Burr. 853. The Local Government Act, 1888 (51 & 52 Vict. c. 41), *e.g.*, does not extend to Scotland, but that country has its own special act, namely, the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), amended by the 58 & 59 Vict. c. 1. See also (as to Public Health) 60 & 61 Vict. c. 38 ; and (as to Poor Laws) 61 & 62 Vict. c. 21 ; and (as to congested districts) 59 & 60 Vict. c. 37 and 60 & 61 Vict. c. 53 ; and (as to sheriffs) 61 & 62 Vict. c. 8.

(*d*) 48 & 49 Vict. c. 61.

(*e*) 50 & 51 Vict. c. 52 ; 52 & 53 Vict. c. 16.

(*f*) See Hale, Hist. C. L. ch. 9 ; *Rex* v. *Cowle*, 2 Burr. 853 ; Com. Dig. Scotland (B.) ; *Mayor of Berwick* v. *Shanks*, 3 Bing. 459.

[Tweed. At the same time, Berwick used to be (and, for some purposes, still is (*g*)), no part of the county of Northumberland, but a county of itself, or *county of a town corporate* (*h*).

Fourthly, as regards *Ireland* : — The inhabitants of Ireland, at the time of the conquest of that island by Henry the Second, were governed by what they called the Brehon law, so styled from the Irish judges having been denominated Brehons (*i*). But on such conquest, the laws of England were received and sworn to by the Irish nation, assembled at the council of Lismore (*k*). And afterwards King John, in the twelfth year of his reign, went into Ireland, and carried over with him many able sages of the law ; and there by his letters patent, in right of the dominion of conquest, he ordained and established that Ireland should be governed by the laws of England (*l*) ; which letters patent Sir Edward Coke apprehends to have been there confirmed in Parliament (*m*). But to this ordinance many of the Irish were averse, and still stuck to their Brehon law,—so that both Henry the Third (*n*) and Edward the First (*o*) were obliged to renew the injunction ; and at length, in a Parliament holden at Kilkenny, 40 Edw. III., under Lionel Duke of Clarence, the then Lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be

(*g*) By the 48 & 49 Vict. c. 23, (for election purposes), and by the Local Government Act, 1888 (51 & 52 Vict. c. 41), (for the purposes of local government) Berwick is now included in the county of Northumberland.

(*h*) See 5 & 6 Will. 4, c. 67, ss. 61, 109 ; 6 & 7 Will. 4, c. 103, s. 6.

(*i*) 4 Inst. 349, 358 ; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

(*k*) Pryn. on 4 Inst. 249.

(*l*) See *Craw* v. *Ramsay*, Vaugh. 294 ; 2 Pryn. Rec. 85 ; *Calvin's Case*, 7 Rep. 23 ; *Campbell* v. *Hall*, Cowp. 210.

(*m*) Co. Litt. 141.

(*n*) 1 Rym. Fœd. 442.

(*o*) "*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant, nobis et concilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.*"—Pryn. Rec. 1218.

[indeed no law, but a lewd custom crept in of later times; and yet, even in the reign of Queen Elizabeth, the wild natives still preserved their Brehon law (*p*).

Notwithstanding the settlement of Ireland by King John, the sovereignty there was only entitled the dominion or lordship of Ireland (*q*); and the king's style there was only *Dominus Hiberniæ*, lord of Ireland, till the thirty-third year of King Henry the Eighth, when that sovereign assumed the title of king, which title was also recognized by Act of Parliament, 35 Hen. VIII. c. 3. But as Ireland was a distinct dominion, *and had Parliaments of its own*, it is to be observed, that though the immemorial customs (or common law) of England were made the rule of justice in Ireland also, yet *no Acts of the English Parliament*, since the twelfth of King John, extended into that kingdom,—unless indeed Ireland was specially named (*r*), or was included under general words, such as "within any of the king's dominions." And this is particularly expressed, and the reason given, in the Year Books; where it is said,—"Ireland hath a Parliament of its own, and maketh "and altereth laws; and our statutes do not bind them, "because they do not send knights to our Parliament; "but their persons are the king's subjects, like as the "inhabitants of Calais, Gascoigne, and Guienne, while "they continue under the king's subjection" (*s*).

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding Parliaments at his pleasure, and these Parliaments enacting such laws as they thought proper (*t*). But an ill use being made of this liberty, particularly by Lord Gormanstone, deputy-lieutenant in the reign of Edward the Fourth (*u*), a set of statutes was enacted in the tenth year of Henry

(*p*) See Spenser's State of Ireland, p. 1513.

(*q*) Stat. Hiberniæ, 20 Hen. 3.

(*r*) 7 Rep. 22.

(*s*) 20 Hen. 6, 8; 2 Rich. 3, 12; 1 Hen. 7, 3; *Calvin's Case*, 7 Rep. 22.

(*t*) Irish Stat. 11 Eliz. st. 3, c. 8.

(*u*) *Ib.* 10 Hen. 7, c. 23.

[the Seventh (Sir Edward Poynings being then Lord Deputy, whence these statutes are called Poynings' laws) ; and by one of Poynings' laws (*x*), in order to restrain the power as well of the deputy as of the Irish Parliament, it was provided,—1. That, before any Parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed therein ; and 2. That after the king, in his council of England, shall have considered, approved or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a Parliament, then the same shall be summoned and held ; and therein the said acts so certified, and no other, shall be proposed, received, or rejected (*y*). But as this statute precluded any laws from being proposed but such as were pre-conceived before the Parliament was in being, it was afterwards provided by the Irish statute of 3 & 4 Ph. & Mary, c. 4, that any new propositions might be certified to England in the usual form, even after the summons and during the session of Parliament. Still, however, there was nothing left to the Parliament in Ireland, but a bare negative or power of *rejecting*, not of proposing or altering any law.] But the usage afterwards was, that bills were often framed in either house, under the denomination of "heads for a bill or bills," and in that shape were offered to the consideration of the lord lieutenant and privy council ; but none of "Poynings' laws" could be repealed or suspended, unless the bill for that purpose, before it was certified to England, had been approved by both houses (*z*).

[By another of "Poynings' laws" (*a*), it was enacted that all Acts of Parliament *before* made in England, should

(*x*) Irish Stat. 10 Hen. 7, c. 4, expounded by 3 & 4 Ph. & M. c. 4.

(*y*) 4 Inst. 353.

(*z*) Irish Stat. 11 Eliz. st. 3, c. 8.

(*a*) Cap. 22.

[be of force within the realm of Ireland (*b*) ;] but Ireland was still not bound by Acts of the English Parliament, passed *after* that statute, which did not specially name or refer to Ireland (*c*); although where Ireland *was* particularly named or referred to, or was included under general words, Ireland was bound by all such Acts of Parliament,—*scil.*, because Ireland was a dependent state: [dependence being very little else but an obligation to conform to the law of that superior upon which the inferior depends, and who, if they will but acknowledge his mastery, will treat them for the future as subjects, and not as enemies. And forasmuch as this state of dependence was disputed by the Irish nation, it was therefore affirmed and declared by statute 6 Geo. I. c. 5.]

The dependence of Ireland upon England being thus established, that dependence extended also to its courts of justice ; wherefore a writ of error (in the nature of an appeal) lay from the Court of King's Bench in Ireland to the Court of King's Bench in England (*d*) ; and an appeal from the Court of Chancery in Ireland lay immediately to the English House of Lords, the peers of Ireland having no jurisdiction either to affirm or to reverse any judgments or decrees whatsoever of the courts in Ireland (*e*) ; and although Ireland subsequently re-asserted for a short time her independence,—the statute 6 Geo. I. c. 5 being repealed by the 22 Geo. II. c. 53, and the parliament and courts of Ireland having (by the 23 Geo. III. c. 28), re-acquired their independence in all matters of legislation and judicature in that country, still that independence was finally abrogated and annulled by the Act of Union for Ireland (39 & 40 Geo. III. c. 67), whereby Ireland was constituted an integral portion of the United Kingdom, subject to the provisions of the Act and of the "Articles

(*b*) 4 Inst. 351.

(*c*) 12 Rep. 112; 21 & 22 Geo. 3, c. 48 (Yelverton's Act).

(*d*) This was law in the time of Hen. VIII., as appears by the antient book, intituled *Diversity of Courts*, c. *Bank le Roy*.

(*e*) 6 Geo. 1, c. 5.

of Union," the most important of which were as follows (*f*) :—

1. That the kingdoms of Great Britain and Ireland shall, on the 1st day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland ;

2. That the succession to the crown of the United Kingdom shall continue the same as the succession to the crown of Great Britain and Ireland before the union ;

3. That there shall be one Parliament, styled the Parliament of the United Kingdom of Great Britain and Ireland ;

4. That twenty-eight peers of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords of the United Kingdom ; and that one hundred (now one hundred and three) commoners shall sit in the House of Commons of the United Kingdom on the part of Ireland,—any peer of Ireland not elected one of the twenty-eight being competent to serve in the House of Commons of the United Kingdom for any county, city, or borough of Great Britain, but (while so serving) not being entitled to any privilege of peerage ; and that all the peers of Ireland, (except those who were members of the House of Commons,) should have all the privilege of peerage as

(*f*) These articles are repeated in the Irish Act, 40 Geo. 3, c. 38. The Act of Union also contained a stipulation that four lords spiritual of Ireland by rotation of sessions should sit in the House of Lords, and also the following clause :— "That the churches of England and Ireland shall be united into one Protestant episcopal church, to be called the United Church of England and Ireland : that the doctrine, worship, discipline, and government of such church shall be the same as that of the church of England ; and *that the continuance and preservation of such united church as the established church of England and Ireland, shall be an essential and fundamental part of the union ;*" but in the year 1870, the Parliament of the United Kingdom put an end to this connection of the church of Ireland with that of England, and also deprived the archbishops and bishops of the church of Ireland of their seats in the House of Lords. See 32 & 33 Vict. c. 42 ; also 35 & 36 Vict. cc. 13, 19 ; and 42 & 43 Vict. c. 67.

fully as the peers of Great Britain,—the right of sitting in the House of Lords only excepted ;

5. That the subjects of Great Britain and Ireland shall all be entitled to the same privileges with regard to trade and navigation (*g*) ;

6. That the future expenditure of the United Kingdom shall be defrayed in such proportion as the Parliament thereof shall from time to time deem just and reasonable ; and

7. That all the laws and courts of each kingdom shall remain the same as already established, subject to such alterations and regulations as circumstances may appear to the Parliament of the United Kingdom to require,—all writs of error, nevertheless, and all appeals which might, before the union, have been decided in the House of Lords of either kingdom, requiring henceforth to be decided in the House of Lords of the United Kingdom only.

Since the union of 1801, all Acts of the united Parliament extend of course to Ireland, whether that portion of the United Kingdom be mentioned or not,—unless Ireland is expressly excepted, or the intention to except it be otherwise plainly shown ; and many Acts of the united Parliament extend to Ireland exclusively, *e.g.*, the Judicature (Ireland) Acts, 1877, 1888, and 1897 (*h*), the Solicitors Act, 1898 (*i*), and the Local Government Act, 1898 (*k*).

Fifthly, as regards the other Islands adjacent to, and which are subject to the crown of, Great Britain :—Some of them (as the Isles of Wight (*l*), Portland, Thanet, &c.)

(*g*) See *Attorney - General* v. *M'Kenzie*, 11 Price, 284.

(*h*) 40 & 41 Vict. c. 57 ; 51 & 52 Vict. c. 27 ; and 60 & 61 Vict. c. 66.

(*i*) 61 & 62 Vict. c. 17.

(*k*) 61 & 62 Vict. c. 37 ; see also the Public Health Act, 1896 (59 & 60 Vict. c. 54) ; and (as to railways) 59 & 60 Vict. c. 34 ; and (as to labourers) 59 & 60 Vict. c. 53.

(*l*) The Isle of Wight, for the purpose of *parliamentary representation*, used to be a county of itself, separate from Hampshire ; and it used to return one member (2 Will. 4, c. 45, s. 16) ; and it still does so (48 & 49 Vict. c. 23).

are comprised within some neighbouring county, and are therefore to be looked upon as forming part of the kingdom of England (*m*) ; but the Isle of Man and the Channel Islands are differently situated, and require a more particular consideration,—although (by the 52 & 53 Vict. c. 63, s. 18), they are (in common with the United Kingdom), comprised in the phrase "British Islands" in all Acts of Parliament passed since the 1st January, 1890.

The Isle of Man is a distinct territory from England, and is, in general, governed not by the laws of England (*n*), but by Acts of its own local legislature, called the *House of Keys* ; neither would any Act of Parliament extend to the Isle of Man, unless that island were specially named (*o*), and it is not unusual, as, *e.g.*, in the undernoted Acts (*p*), to extend to the Isle of Man a somewhat special treatment ; moreover, the process of the English courts (the writ of *habeas corpus* excepted) does not run in the Isle of Man (*q*).

[The Isle of Man was formerly a subordinate feudatory kingdom, and was subject originally to the Kings of Norway ; then to Kings John and Henry the Third of England : afterwards to the Kings of Scotland ; and then again to the crown of England ; and then at length we find King Henry the Fourth claiming the island by right of conquest, and disposing of it to the Earl of

(*m*) Com. Dig. Navigation, F. 5 ; 4 Inst. 287.

(*n*) See Com. Dig. Navigation, F. 2 ; Co. Litt. 9 a ; *Calvin's Case*, 7 Rep. 21 ; 4 Inst. 283.

(*o*) 4 Inst. 284 ; 2 And. 116.

(*p*) See (as to *customs*, including *excise*) 39 & 40 Vict. c. 36 ; 42 & 43 Vict. c. 21 ; 50 & 51 Vict. c. 5 ; 58 & 59 Vict. c. 38 ; 61 & 62 Vict. c. 10 ; and (as to *harbours*) 26 & 27 Vict. c. 86 ; 27 & 28 Vict. c. 62 ; 29 & 30 Vict. c. 23 ; 35 & 36 Vict. c. 23 ; 37 & 38 Vict. c. 8 ; 46 & 47 Vict. c. 9 ; 47 Vict. c. 7 ; 51 & 52 Vict. c. 39 ; and (as to the *army*, including the *reserve forces*) 44 & 45 Vict. c. 58 ; 45 & 46 Vict. c. 58 ; and (as to *reformatory schools*) 47 & 48 Vict. c. 40 ; and (as to *savings banks*) 50 & 51 Vict. c. 40 ; and (as to *telegraphs* and *post offices*) 52 & 53 Vict. c. 34 ; 55 & 56 Vict. c. 24 ; and (as to *church lands* and *new parishes* and *churches*) 29 & 30 Vict. c. 81 ; 60 & 61 Vict. c. 33.

(*q*) *Re Brown*, 33 L. J. (N.S.) Q. B. 193.

[Northumberland ; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Hen. IV. (*r*). The island thereafter continued for eight generations in the possession of the lineal descendants of Sir John de Stanley, the grantee of Henry the Fourth, till the death of Ferdinando, Earl of Derby, A.D. 1594 ; when a controversy arose concerning the inheritance thereof between Ferdinando's daughters and William his surviving brother ; upon which, and a doubt that was started concerning the validity of the original patent (*s*), the island was seized into Queen Elizabeth's hands, and afterwards various grants were made of it by King James the First, all which being expired or surrendered, it was granted afresh in 7 Jac. 1 to William Earl of Derby, and the heirs male of his body, with remainder to his heirs general ; which last mentioned grant was the next year confirmed by Act of Parliament, with a restraint of the power of alienation by the said Earl and his issue male. On the death of James Earl of Derby, A.D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the meantime, though the title of king had long been disused, the successive Earls of Derby, as lords of Man, had maintained a sort of royal authority therein, by assenting to or dissenting from laws and exercising an appellate jurisdiction,—though an appeal always lay from their decrees to the sovereign of Great Britain in council (*t*). But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (affording as it did a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the Treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors therein for the use of the Crown. And this purchase was completed in the year 1765,—and was confirmed

(*r*) Selden, Tit. Hon. 1, 3.
(*s*) Camden, Eliz. A.D. 1594.
(*t*) *Christian* v. *Corren*, 1 P. Wms. 329.

[by statutes 5 Geo. III. cc. 26 and 39,—whereby the whole island and all its dependencies so granted as aforesaid, (except the landed property and some other rights of the Atholl family), became inalienably vested in the Crown.

The Channel Islands, namely, Jersey, Guernsey, Sark, Alderney, and their appendages, were antiently parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line (*u*). These islands are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an antient book intituled *Le Grand Coustumier* (*x*). The writ or process of the sovereign from the English courts is in ordinary cases of no force in these islands (*y*) ; but his commission is (*z*) ; and the writ of *habeas corpus* also is (*a*). Also, these islands are not bound by common acts of the English Parliament, unless particularly named. All causes are determined in the first instance by their own officers, the bailiffs and *jurats* of the islands (*b*) ; but an appeal lies from their decision to the sovereign in council.]

Sixthly, as regards the more distant possessions or dependencies of the British Crown in various quarters of the globe :—Most of these are usually called *colonies* ; and whenever in the course of what follows that term is used, it is to be understood as referring to them all (*c*). Colonies, it is to be observed, are no part of the mother country, but distinct (though dependent) dominions. In general, they are either gained from other states by conquest or cession, or else they are acquired by right of occupancy only, that

(*u*) 4 Inst. 286 ; *Calvin's Case*, 7 Rep. 20 b ; *Martin* v. *M'Culloch*, 1 Moore, Priv. Counc. Rep. 308.

(*x*) Hale, Hist. Com. Law. ch. 6.

(*y*) Inst. *ubi sup.*

(*z*) See (as to *probate commissioners*) 21 & 22 Vict. c. 95, s. 30 ; and (as to the *post-office*) 55 & 56 Vict. c. 24.

(*a*) 31 Car. 2, c. 2 ; 56 Geo. 3, c. 100 ; *Carus Wilson's Case*, 7 Q. B. 984.

(*b*) *In re the Jersey Jurats*, Law Rep. 1 P. C. 94 ; *Williams* v. *Stevens*, *ib.* 352.

(*c*) 28 & 29 Vict. c. 63, s. 1 ; c. 113, s. 1 ; and 52 & 53 Vict. c. 63, s. 18.

is, by finding them desert and uncultivated, and peopling them from the mother country.

Both the right by conquest or cession and that by occupancy are founded upon the law of nations. But in conquered or ceded countries that have already laws of their own, those laws remain in force until changed by competent authority (*d*),—the common law of England, as such, having no authority there: [on the other hand, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being—which are the birthright of every subject (*e*)—are immediately there in force (*f*),—subject, however, to this limitation, namely, that (in the absence of any express statutory provision to the contrary) (*g*) the colonists carry with them only so much of the English law as is applicable to the condition of an infant colony,—such, for instance, as the general rules of inheritance, and of protection from personal injuries; and the artificial refinements and distinctions incident to an ancient people (*h*), or to a great commercial people (*i*), are neither necessary nor convenient for an infant colony, and therefore are not in force there.] But as to colonies of every description, the sovereign exercises the right of appointing governors (*k*), and of issuing warrants for the appointment of officers, whether judicial, administrative, or ecclesiastical (*l*). The right of

(*d*) *Campbell* v. *Hall*, Cowp. 204; 2 P. Wms. 75; *Rex* v. *Vaughan*, 4 Burr. 2500.

(*e*) *Campbell* v. *Hall*, *ubi sup.*

(*f*) *Blankard* v. *Galdy*, Salk. 411; S. C. 4 Mod. 215; *Smith* v. *Brown*, Salk. 666.

(*g*) *Att.-Gen.* (New South Wales) v. *Love*, [1898] A. C. 679 (as to the Nullum Tempus Act, 9 Geo. 3, c. 16.)

(*h*) *Att.-Gen.* v. *Stewart*, 2 Mer. 143; *Whicker* v. *Hume*, 7 H. L. Ca. 134; *Jex* v. *M'Kinney*, 14 App. Ca. 77; *Cooper* v. *Stuart*, *ibid*, 286; *Canterbury Corporation* v. *Wyburn*, [1895] A. C. 89.

(*i*) *New Zealand Loan Co.* v. *Morrison*, [1898] A. C. 349.

(*k*) See (as to *colonial governors*) 26 & 27 Vict. c. 84, s. 2; 52 & 53 Vict. c. 63. s. 18; and (as to the *retiring pensions*) 28 & 29 Vict. c. 113; 35 & 36 Vict. c. 29.

(*l*) See (as to *colonial bishops*) 31 Geo. 3, c. 31; 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 5 & 6 Vict. c. 4, s. 119; 15 & 16 Vict. cc. 52,

legislation, too, is in some cases vested in the Crown,—for any colony which has been acquired by conquest or cession is subject to such laws as the sovereign in council may impose (*m*), or to such as may be imposed by any legislative council established in the colony under the royal authority ; but this does not extend to colonies acquired by occupancy,—for in these the Crown possesses no such legislative right. The sovereign may, nevertheless, in any colony, however acquired, direct the governor to summon a representative assembly from among the inhabitants themselves for the purpose of interior legislation ; and it is an established principle, that a conquered or ceded colony, to which the Crown has once thus granted a representative legislature, is no longer subject to legislation by the Crown (*n*).

Such would seem, in a general point of view, to be the extent of the royal power in the colonies acquired either by conquest, cession, or occupancy ; but in connection with this subject, it is proper also to notice the Foreign Jurisdiction Act, 1890 (*o*), by which (re-enacting a like provision of the 6 & 7 Vict. c. 94) it has been declared, that it shall be lawful for Her Majesty to exercise any power or jurisdiction that she has or may have within any foreign country or place *out* of her dominions, in the same and as ample a manner as if such power or jurisdiction had been obtained by cession or conquest: and that everything done in pursuance of such power or jurisdiction in any foreign country shall be as valid as if it had been done according to the local law then in force within such country ; and, further, that if in any proceeding, civil or criminal, in any court of Her Majesty any question arises as to the existence or extent of such power or jurisdiction,

53, 88 ; 16 & 17 Vict. c. 49 ; *The Bishop of Natal*, 3 Moo. P. C. (N.S.) 115 ; *Bishop of Natal* v. *Gladstone*, Law Rep., 3 Eq. 1 ; and (as to the *colonial clergy*) 37 & 38 Vict. c. 77.

(*m*) *Calvin's Case*, 7 Rep. 17 b ; *Campbell* v. *Hall*, Cowp. 211.

(*n*) 26 & 27 Vict. c. 84 ; 28 & 29 Vict. c. 63, s. 5.

(*o*) 53 & 54 Vict. c. 37 ; *Phillips* v. *Eyre*, Law Rep., 6 Q. B. 1.

questions properly framed shall be transmitted to a principal secretary of state, and his answers thereon shall be final and conclusive evidence of the matters therein contained.

Such being the nature of the authority of the Crown in our colonial possessions (as to which authority we may add that it is exercised through the agency of a principal secretary of state, called the secretary of state for the colonies), it is almost superfluous to remark that they are all, under all circumstances and whatever may be their political constitution, subject to the legislative control of the British parliament; which control at one time extended even to *taxing* the colonies (*p*),—but the exercise of this extension of the legislative control was strenuously opposed by, and led eventually in 1782 to the independence of, the United States of America (*q*); and having been first given up in 1778 (*r*) as regards America, it has since been abandoned with regard to all our colonial possessions. But the general right of the mother country to legislate for the colonies is (excepting in the matter of taxation) still preserved, and is expressly recognized in the Colonial Laws Validity Act, 1865 (*s*).

But though it is competent to parliament to legislate for the colonies, yet a colony is not considered as affected by Acts of Parliament passed after its acquisition, and while it is subject to other legislative authority,—unless it be referred to in the Act by name, or by general description, such as "the colonies"; or unless the Act be, in its nature, obviously intended to affect all our possessions wherever situate. In the case of a colony acquired by occupancy, Acts of Parliament passed before its acquisition come into force immediately upon that event, as part of the general law of England—as to all provisions at least not unsuitable to the social circumstances

(*p*) 6 Geo. 3, c. 12.

(*q*) 22 Geo. 3, c. 46; and the Treaty of Paris, 3rd September, 1783.

(*r*) 18 Geo. 3, c. 12.

(*s*) 28 & 29 Vict. c. 63.

of the colony; but a colony acquired by conquest or cession, is not in general affected by statutes of the United Kingdom passed before its acquisition.

Such being the general principles of law applicable to colonies, we may next advert to the actual constitution of those which at present belong to the British Crown (*t*).

(*t*) As to these, see the following Acts:—

Africa, 1 & 2 Geo. 4, c. 28; 6 & 7 Vict. c. 13; 21 & 22 Vict. c. 35. *Africa* (*South*), 40 & 41 Vict. c. 47. *Africa* (*West*), 1 & 2 Geo. 4, c. 28; 16 & 17 Vict. c. 86; 24 & 25 Vict. c. 31; 34 & 35 Vict. c. 8. *America*, 6 Geo. 3, c. 12; 59 Geo. 3, c. 38; 1 & 2 Geo. 4, c. 66; 16 & 17 Vict. c. 107, ss. 181, 185, 187; 22 & 23 Vict. c. 26; 35 & 36 Vict. c. 45. *Australia*, 18 & 19 Vict. c. 56; 24 & 25 Vict. c. 44; 36 & 37 Vict. c. 22; 58 & 59 Vict. c. 3; and (*Australasia*, defence of) 51 & 52 Vict. c. 32; and (*Australasia*, federation of) 48 & 49 Vict. c. 60. *Australia* (*South*), 5 & 6 Vict. c. 61; 13 & 14 Vict. c. 59; 24 & 25 Vict. c. 44; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *Australia* (*West*), 13 & 14 Vict. c. 59; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74; 53 & 54 Vict. c. 26. *Bechuanaland* and *Basutoland*, 52 & 53 Vict. c. 38. *British Columbia*, 22 & 23 Vict. c. 26; 29 & 30 Vict. c. 67; 33 & 34 Vict. c. 66; 55 & 56 Vict. c. 52. *British Honduras*, 44 & 45 Vict. c. 36. *British Kaffraria*, 28 & 29 Vict. c. 5. *Canada*, 14 Geo. 3, cc. 83, 88; 1 & 2 Geo. 4, c. 66; 6 Geo. 4, cc. 59, 75; 9 Geo. 4, c. 51; 3 & 4 Vict. c. 35; 14 & 15 Vict. c. 63; 19 & 20 Vict. c. 23; 20 & 21 Vict. c. 34; 30 & 31 Vict. c. 3; 31 & 32 Vict. c. 135; 32 & 33 Vict. c. 11, s. 7; c. 101; 34 & 35 Vict. c. 28; 38 & 39 Vict. cc. 38, 53; 49 & 50 Vict. cc. 13, 35; 52 & 53 Vict. c. 28; 58 & 59 Vict. sess. 2, c. 3. *Cape of Good Hope*, 28 & 29 Vict. c. 5; 40 & 41 Vict. c. 17; 48 & 49 Vict. c. 7. *China*, 3 & 4 Will. 4, c. 93; 22 & 23 Vict. c. 9. *Falkland Islands*, 6 & 7 Vict. c. 13. *Heligoland*, 53 & 54 Vict. c. 32. *Hong-Kong*, 18 & 19 Vict. c. 104. *Leeward Islands*, 34 & 35 Vict. c. 107. *Mauritius*, 55 & 56 Vict. c. 49. *New Brunswick*, 14 & 15 Vict. c. 63; 20 & 21 Vict. c. 34; 30 & 31 Vict. c. 3; 38 & 39 Vict. c. 38. *Newfoundland*, 49 Geo. 3, c. 27; 59 Geo. 3, c. 38; 5 Geo. 4, c. 67; 6 Geo. 4, c. 59; 2 & 3 Will. 4, c. 78; 5 & 6 Vict. c. 120; 12 & 13 Vict. c. 21; 35 & 36 Vict. c. 45. *New South Wales*, 54 Geo. 3, c. 15; 9 Geo. 4, c. 83; 5 & 6 Will. 4, c. 62; 3 & 4 Vict. c. 62; 5 & 6 Vict. c. 76; 7 & 8 Vict. c. 74; 12 & 13 Vict. c. 22; 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 54; 24 & 25 Vict. c. 44; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *New Zealand*, 3 & 4 Vict. c. 52; 9 & 10 Vict. c. 103; 10 & 11 Vict. c. 112, s. 19; 11 & 12 Vict. c. 5; 12 & 13 Vict. c. 79; 13 & 14 Vict. c. 70; 14 & 15 Vict. cc. 84, 86; 15 & 16 Vict. c. 72; 20 & 21 Vict. c. 53; 25 & 26 Vict. c. 48; 26 & 27 Vict. c. 23; 31 & 32 Vict. cc. 57, 92. *Norfolk Island*, 4 & 5 Will. 4, c. 65. *Nova*

And here a great variety is observable. For although, in the case of all the colonies, they are subject to a local governor (the representative and deputy of the sovereign), who acts under the royal commission, and the royal instructions by which that commission is usually accompanied (*u*); and although, in the case of all the colonies, the law is administered by local judges deriving their authority from, but not in all cases appointed by, the Crown, but appeal being allowed from their decisions to

Scotia, 30 & 31 Vict. c. 3; 38 & 39 Vict. c. 38. *Queensland*, 24 & 25 Vict. c. 44. *Straits Settlements*, 3 & 4 Vict. c. 56: 11 & 12 Vict. c. 21; 18 & 19 Vict. c. 93; 20 & 21 Vict. c. 75; 29 & 30 Vict. c. 115; 30 & 31 Vict. c. 45, s. 17; 32 & 33 Vict. c. 88; 33 & 34 Vict. c. 55; 37 & 38 Vict. c. 38. *Vancouver's Island*, 12 & 13 Vict. c. 48. *Van Diemen's Land*, 6 Geo. 4, c. 39; 9 Geo. 4, c. 83; 5 & 6 Vict. c. 76, s. 53; 7 & 8 Vict. c. 74, s. 6; 10 & 11 Vict. c. 57; 13 & 14 Vict. c. 59; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *Victoria*, 54 Geo. 3, c. 15; 2 & 3 Vict. c. 70; 5 & 6 Vict. c. 76; 7 & 8 Vict. cc. 72, 74; 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 55; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. Moreover, with respect to the WEST INDIES, we may notice the following Acts: *For the relief of certain Colonies and plantations therein*, 2 & 3 Will. 4, c. 125; 5 & 6 Will. 4, c. 51; 3 & 4 Vict. c. 40; 7 & 8 Vict. c. 17; 8 & 9 Vict. c. 50; 11 & 12 Vict. c. 38; 19 & 20 Vict. c. 35: *For the sale of encumbered estates therein*, 17 & 18 Vict. c. 117 (amended and continued by 21 & 22 Vict. c. 96; 25 & 26 Vict. c. 45; 27 & 28 Vict. c. 108; 35 & 36 Vict. c. 9; and provisions for its discontinuance contained in 49 & 50 Vict. c. 36): *For regulating the prisons there*, 1 & 2 Vict. c. 67: *For increasing the number of bishoprics therein*, 5 & 6 Vict. c. 4 (see 31 & 32 Vict. c. 120): *For establishing courts of appeal for certain of the West India Islands*, 13 & 14 Vict. c. 15; and (as to the *Windward Islands*) 52 & 53 Vict. c. 33: *For enabling her Majesty to confirm an act passed by Antigua as to Barbuda*, 22 & 23 Vict. c. 13: *To authorize the extension of a loan by West India relief commissioners to Dominica*, 30 & 31 Vict. c. 91: *As to loan to Jamaica*, 25 & 26 Vict. c. 55; 32 & 33 Vict. c. 69; 42 & 43 Vict. c. 16: *For the government of the Cayman Islands*, 26 & 27 Vict. c. 31: *To make provision for the government of Jamaica*, 29 & 30 Vict. c. 12: *To annex the Turks and Caicos Islands to the colony of Jamaica*, 36 & 37 Vict. c. 6: *To give an appeal from British Honduras to Jamaica*, 44 & 45 Vict. c. 36: *Constitutions of St. Vincent, Tobago, and Grenada*, 39 & 40 Vict. c. 47; and for the *union of Trinidad and Tobago*, 50 & 51 Vict. c. 44. And as to *the government of British settlements*, see 50 & 51 Vict. c. 54.

(*u*) 28 & 29 Vict. c. 63, s. 4; 50 & 51 Vict. c. 54.

the Sovereign in Council,—yet in other particulars our colonies differ widely from each other,—and chiefly, in their plan of government, some of them having received the gift of English laws, others remaining subject to the codes of foreigners, their former masters ; some remaining under the legislative power of the Crown itself, and others receiving their laws from a local legislative council, or from representative assemblies, established by authority of the Crown or of Parliament. With respect to those possessing representative assemblies, their whole interior policy is in general modelled upon that of the mother country,—for having a governor (the representative of royalty), and royal courts of justice, they have also a local council (forming a sort of upper house) in addition to their general assembly (corresponding with our House of Commons) ; and by the united authority of those two bodies, they make laws suited to the necessities or requirements of the colony,—subject only to such restrictions as result from their subordination to the Imperial Parliament. But these colonial statutes require the assent of the governor as representing the Crown, before they can come into even temporary operation ; and they are liable to be afterwards annulled by a notification from this country of their having been *disallowed* by the Sovereign in Council (*x*); and they ought, in strictness, always to be enacted subject to the signification of Her Majesty's pleasure (*y*). And now, by the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), passed "to remove " doubts as to the validity of colonial laws," it has been declared, that any colonial law *repugnant* in any respect to the provisions of any Act of Parliament extending to the colony, shall be void and inoperative to the extent of such repugnancy (*z*) ; but no colonial law, *unless* so made void and inoperative, is to be affected by its repugnancy to the law of England (*a*) ; and every *colonial* legislature may establish courts and regulate the administration of

(*x*) Clark's Colonial Law, 41.
(*y*) 56 & 57 Vict. c. 72.
(*z*) 28 & 29 Vict. c. 63, s. 2.
(*a*) *Ibid.* s. 3.

justice in the colony ; and every *representative* legislature may make laws as to its own constitution, powers, and procedure.

Thus much as to our colonies in general (*b*). But the West Indies and the East Indies (or India) severally require our special attention. And firstly, as regards the West Indies,—From the earliest period of their acquisition, the produce of these colonies had been raised by the compulsory labour of the negro race ; and notwithstanding the peculiar freedom of her own institutions, the mother country never hesitated to lend her sanction to that method of cultivation there (*c*). The conscience of the British public was, however, at length aroused against the system, partly by the atrocity of the slave traffic itself, and partly

(*b*) We may here notice the following statutes applicable to our colonies *in general*. As to *the apprehension of fugitive offenders*, 44 & 45 Vict. c. 49 ; and as to the *removal of prisoners*, 47 & 48 Vict. c. 50. As to *evidence*, 6 & 7 Vict. c. 22 ; and as to *boundaries*, 58 & 59 Vict. c. 34. As to *probates* and *administrations*, 55 & 56 Vict. c. 6. As to *letters-patent*, 26 & 27 Vict. c. 76. As to *registration of English companies in the colonies*, 46 & 47 Vict. c. 30 ; and as to the *composition of stamp duties*, 61 & 62 Vict. c. 10, s. 5. As to the *jurisdiction of the admiralty*, 12 & 13 Vict. c. 96 ; 23 & 24 Vict. c. 88 ; 53 & 54 Vict. c. 27. As to the *post-office*, 12 & 13 Vict. c. 66. As to *lighthouses*, 18 & 19 Vict. c. 91. As to the *proof of acts of state and legal proceedings*, 14 & 15 Vict. c. 49, s. 7. As to the *revenues of the crown*, 15 & 16 Vict. c. 39 ; and as to *crown lands, and the emigration commissioners*, 18 & 19 Vict. c. 119. As to *the ascertainment of the law*, 22 & 23 Vict. c. 63 ; 24 & 25 Vict. c. 11 ; and as to *the relief of colonial attorneys*, 47 & 48 Vict. c. 43. As to the *trial of criminals*, 23 & 24 Vict. c. 122 ; and as to the *trial of crimes committed out of the local jurisdiction*, 37 & 38 Vict. c. 27. As to writs of *habeas corpus*, 25 & 26 Vict. c. 20. As to *merchant shipping inquiries*, 45 & 46 Vict. c. 76 ; and as to the *registration of ships*, 31 & 32 Vict. c. 129. As to certain *acts of legislatures*, 26 & 27 Vict. c. 84. As to *the validity of certain marriages*, 28 & 29 Vict. c. 64. As to *gold coins from branch mints*, 33 & 34 Vict. c. 10. As to the *prevention of kidnapping*, 35 & 36 Vict. c. 19 ; 38 & 39 Vict. c. 51. As to *stock*, 40 & 41 Vict. c. 59 ; and as to *stock transfers*, 55 & 56 Vict. c. 35. As to *fortifications, works, buildings, and land*, 40 & 41 Vict. c. 23 ; and as to *naval defence*, 28 & 29 Vict. c. 14.

(*c*) *Forbes* v. *Lord Cochrane*, 2 Barn. & Cress. 469 ; *Somersett's Case*, 11 St. Tr. 340 ; Lofft, 1.

by the wretchedness of the condition of slavery; and eventually the slave trade was abolished in 1807 (*d*) ; and as from 1st August, 1834, the system of slavery itself (*scil.*, in our colonies) was also abolished (*e*),—the sum of twenty millions sterling, in compensation for the loss sustained, being awarded to the slave proprietors.

Secondly, as regards the East Indies (or India) :—In 1708, two rival associations existed in England for the purposes of the East India trade ; but in that year, these two associations were consolidated into one (*f*), with the exclusive privilege of trading to the East Indies and other specified places (*g*),—a privilege repeatedly renewed by successive subsequent grants. This new body was originally incorporated by the name of "The United Company of Merchants of England trading to the East Indies ;" but convenience attached to them the shorter appellation of "The East India Company," which afterwards became by express provision their proper legal style (*h*). In the progress of their well-known history, they crushed upon the Indian Peninsula the power of the rival settlers from France ; and though first instituted for purposes merely commercial, their policy, as administered by the governors whom they sent out, gradually led to the acquisition of immense territorial dominions, by which they became effectively (though subject to the undoubted supremacy of the British Crown) the sovereigns of India (*i*). The unexampled grandeur of this company rendered the regulation of its affairs, for a long period of our history, an object of the highest interest and importance to the British nation ; and in 1773, the constitution of the company was modified (*k*) ; and in 1784, its administration of the East was brought under the superintendence of the executive govern-

(*d*) 47 Geo. 3, st. 1, c. 36.
(*e*) 3 & 4 Will. 4, c. 73.
(*f*) 6 Ann. c. 71, s. 13.
(*g*) 9 & 10 Will. 3, c. 44, s. 81.
(*h*) 3 & 4 Will. 4, c. 85, s. 111.
(*i*) *Gibson* v. *East India Company*, 5 Bing. N. C. 272 ; *Mayor of Lyons* v. *East India Company*, 1 Moore, Priv. Counc. Rep. 374.
(*k*) 13 Geo. 3, c. 63 ; 21 Geo. 3, c. 70.

ment at home, by the establishment of the Board of Commissioners for the affairs of India, called the "Board of Control" (*l*). Still, however, the commercial monopoly of the company remained entire; but in 1813, it was provided, by the act then passed for the temporary renewal of the company's charter, that the trade from all places except China, and in all commodities except tea, should be thrown open (under certain restrictions and limitations) to every subject of the realm (*m*); and the expediency being once recognized of admitting the capital of our private merchants to a free participation in every branch of the Indian traffic, an arrangement was accordingly made with the company for that purpose in 1832. And this arrangement was carried into effect under the 3 & 4 Will. IV., c. 85, by which the exclusive rights of trading of the company were abolished (*n*); and though the territories and other property of the company, with the exception of St. Helena (which was by the same statute vested in the Crown), were allowed to remain under the government of the company, this was declared to be "in trust" only for "his majesty, his heirs and successors" (*o*); and the local government was committed to a governor-general and a board of councillors, who, under the style of "The Governor-General of India in Council" (*p*), were invested with a superintending authority over all the local Indian governments called Presidencies, in all points relating to their civil and military administration (*q*), and with power to make laws for all persons, whether British or native, throughout the whole of the territories, and for all servants of the company within the dominions of allied states (*r*),—subject, however, to a power in the Court of Directors to disallow any law so made (*s*); and subject also to the superintending and paramount authority of the Imperial

(*l*) 23 Geo. 3, c. 52; 24 Geo. 3, sess. 2, c. 25; 26 Geo. 3, c. 16.
(*m*) 53 Geo. 3, c. 155, s. 7.
(*n*) 3 & 4 Will. 4, c. 85, s. 3.
(*o*) 3 & 4 Will. 4, c. 85, ss. 1, 2.
(*p*) Sect. 39; and see 32 & 33 Vict. c. 98.
(*q*) 3 & 4 Will. 4, c. 85, s. 65.
(*r*) Sect. 43.
(*s*) Sect. 44.

Parliament (*t*). The ecclesiastical establishment of India was also remodelled by the same Act, and provision was thereby made for founding two bishoprics—those of Madras and Bombay—in addition to the diocese of Calcutta, already established ; and the Bishop of Calcutta was declared to be the metropolitan bishop in India, with such jurisdiction and functions as the Sovereign by letters patent should direct,—subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury (*u*).

Under the 3 & 4 Will. IV. c. 85, the territories of India were to continue under the government of the East India Company until 30th April, 1854 ; and under the 16 & 17 Vict. c. 95, these territories even after that time were to continue under the same government until Parliament should otherwise provide. Such new provision, however, was in fact shortly afterwards made, and it was hastened by circumstances of an unexpected and disastrous kind, namely, the Sepoy mutiny of 1857, which was not suppressed till the close of 1858,—when it appeared to Parliament that the time had arrived for a more effectual administration of India ; and by 21 & 22 Vict. c. 106 (intituled An Act for the Better Government of India), it was accordingly provided, that all the powers and rights vested in the East India Company in trust as aforesaid should cease, and should become vested in Her Majesty and be exercised in her name ; and shortly afterwards (*i.e.*, in 1874), the company was dissolved (*x*).

The statute 21 & 22 Vict. c. 106, just referred to, after providing for the direct sovereignty of the English Crown in India (*y*), provided also specifically for the determination of the functions and powers theretofore vested in the Court of Directors and Court of Proprietors in relation to the government of India (*z*), and for the abolition of the Board of Control (*a*),—all persons who then held offices,

(*t*) Sect. 81.

(*u*) Sect. 94 ; and see 34 & 35 Vict. c. 62 ; 37 & 38 Vict. c. 13.

(*x*) 36 & 37 Vict. c. 17.

(*y*) 21 & 22 Vict. c. 106, s. 1.

(*z*) 21 & 22 Vict. c. 106, s. 60.

(*a*) Sect. 61.

employments or commissions, under the company in India, being deemed thenceforth to hold them under her Majesty (*b*) ; and the act contained also a great variety of enactments as to the manner in which the business to be transacted in this country, in relation to the Indian government, and the correspondence therewith, should in future be conducted (*c*),—and the general effect of which enactments, was :—that such business and correspondence were to be conducted by a principal secretary of state in council (*d*); and that such council—of which he was to be president, with a power himself to vote (*e*)—should consist of fifteen members (since made reduceable, but not below *ten*)| (*f*), under the style of the "Council of India," by way of distinction from the "Council of the Governor-General" already established in that country (*g*) ; and that the members of the council should be salaried (*h*), and should hold office during good behaviour (*i*), but should not be capable of sitting or voting in parliament (*j*) ;—and the act also provided, that all provisions then in force, under charter or otherwise concerning India, should, subject to the provisions of the act, continue in force, but should be construed as referring to the secretary of state in council, in lieu of the company and the court of directors and court of proprietors thereof (*k*).

With a view to the recognition of the transfer of government from the East India Company to Her Majesty effected by the statute 21 & 22 Vict. c. 106, above mentioned, and for divers other weighty reasons of state, it was subsequently thought expedient, that an appropriate alteration should take place in the style and titles appertaining to the Imperial Crown of the United Kingdom and

(*b*) Sect. 58.

(*c*) Sect. 19.

(*d*) Sects. 3, 21.

(*e*) Sect. 21.

(*f*) 52 & 53 Vict. c. 65. As to the constitution of the "Council of India," see also 39 & 40 Vict. c. 7 ; 55 & 56 Vict. c. 14.

(*g*) 21 & 22 Vict. c. 106, s. 7.

(*h*) Sect. 13.

(*i*) Sect. 11.

(*j*) Sect. 12.

(*k*) Sect. 64.

its dependencies; and accordingly, under the 39 & 40 Vict. c. 10, and a Royal Proclamation made under the authority of that act, Her Majesty, in the year 1876, added to her previous style and titles the title of "Empress of India" (*l*).

(*l*) The principal statutes relating to India passed *prior* to 1858 are the following:—As to the administration of justice, 37 Geo. 3, c. 142; 39 & 40 Geo. 3, c. 79; 4 Geo. 4, c. 71; 6 Geo. 4, c. 85; 9 Geo. 4, c. 74: As to the India and China Trade, 3 & 4 Will. 4, c. 93; 3 & 4 Vict. c. 56; 16 & 17 Vict. c. 107, ss. 327, 329; 17 & 18 Vict. c. 104, s. 108: And as to the governor-general and his council, and the age, qualifications and appointment of members of the civil or military service of the company, 5 & 6 Will. 4, c. 52; 16 & 17 Vict. cc. 95, 107; 17 & 18 Vict. c. 77. And the statutes relating to India passed *since* 1858, comprise the following:—As to revenue, &c., 22 Vict. c. 11; 22 & 23 Vict. c. 39; 23 & 24 Vict. cc. 5, 102, 130; 24 & 25 Vict. cc. 3, 25, 118; 25 & 26 Vict. c. 7; 26 & 27 Vict. c. 73; 32 & 33 Vict. c. 106; 34 & 35 Vict. c. 29; 36 & 37 Vict. c. 32; 37 & 38 Vict. c. 3; 40 & 41 Vict. c. 51: As to loans to India, 44 & 45 Vict. c. 54; 45 & 46 Vict. c. 79; 48 & 49 Vict. cc. 28, 67; 56 & 57 Vict. c. 70; 61 & 62 Vict. c. 13: As to India stock, 44 & 45 Vict. c. 63; and unclaimed stock, 48 & 49 Vict. c. 25: As to the army and navy, 23 & 24 Vict. c. 100; 29 & 30 Vict. c. 47; 31 & 32 Vict. c. 38; 37 & 38 Vict. c. 61; as to the marines, 47 & 48 Vict. c. 38: As to the civil service, 24 & 25 Vict. c. 54; 33 & 34 Vict. c. 3; and as to superannuation allowances, 60 Vict. c. 10: As to the council of the governor-general, and the government of the presidencies and provinces, &c., 24 & 25 Vict. c. 67; 28 & 29 Vict. c. 17; 32 & 33 Vict. cc. 97, 98; 33 & 34 Vict. c. 3; 34 & 35 Vict. c. 34; 37 & 38 Vict. c. 91; and (as to the Bombay and Madras) 56 & 57 Vict. c. 62: As to the courts of justice, &c., 24 & 25 Vict. c. 104; 28 & 29 Vict. c. 15; 34 & 35 Vict. c. 34; 37 & 38 Vict. c. 27: As to the "elder widows' fund," 36 & 37 Vict. c. 17; 41 & 42 Vict. c. 47; 60 Vict. c. 11: As to the "Bombay civil fund," 45 & 46 Vict. c. 45; and see *Ex parte Pringle*, 39 Ch. Div. 300: As to the purchase of the Oude and Rohilkund Railway, and the construction of railways by contract, 51 & 52 Vict. c. 5; and as to the purchase of the South India Railway, see 53 & 54 Vict. c. 6; and as to Indian Railways (payment of interest during construction), see 57 & 58 Vict. c. 12.

SECTION V.

OF THE KINGDOM OF ENGLAND ITSELF.

[We come now to consider the kingdom of England itself; and the first point to observe is, that the high seas are, in one sense, part of the kingdom of England proper, —for thereon the English courts of admiralty have jurisdiction, although they may not be subject to the common law strictly so called. The high seas begin at the low water-mark and extend outwards (*m*),—a distinction being taken (for certain limited purposes only) between the first three miles extending outwards from the low water-mark and the sea beyond such three miles limit (*n*); and as regards the *foreshore* of the kingdom, being the space between the high water-mark and the low water-mark, where the sea ebbs and flows, the common law and the admiralty have alternate jurisdiction, the common law having jurisdiction on the land, and the admiralty on the water (*o*).

All the territory of England is comprised in two divisions, the one of which is ecclesiastical, and the other civil (*p*).

I. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York,—a province being the circuit of an archbishop's jurisdiction. Each

(*m*) Co. Litt. 260.

(*n*) *The Queen* v. *Keyn*, 2 Ex. D. 63; 41 & 42 Vict. c. 73 (as to offences committed by *foreigners* within the three miles); and (as to the jurisdiction outside those three miles) see (as regards the protection of submarine telegraphs) 48 & 49 Vict. c. 49; 50 Vict. c. 3; and (as regards the North Sea fishing trade) 46 & 47 Vict. c. 22; 56 & 57 Vict. c. 17.

(*o*) Finch, L. 78; *Constable's Case*, 5 Rep. 107 a.

(*p*) As to the territorial divisions of England, some valuable information will be found in the preface to the Population Abstract of 1831, vol. i. p. xiv.

[province contains divers dioceses, or sees of (suffragan) bishops (*q*); and every diocese is divided into archdeaconries, each archdeaconry into rural deaneries, and every rural deanery into parishes (*r*).

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein (*s*); and it is agreed on all hands, that, in the early ages of Christianity in this island, parishes signified the same that a diocese does now (*t*). There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion (*u*).

Mr. Camden says, that England was divided into parishes by Archbishop Honorius, about A.D. 636 (*v*); but Sir Henry Hobart says that parishes were first erected by the council of Lateran, which was held A.D. 1179 (*x*),—the truth lying, most probably, between the two dates (*y*). And we find the distinction of parishes, and of mother-churches, so early as in the laws of King Edgar, about the year 970; for whereas before that time the consecration of

(*q*) Bishops are here termed "suffragan" (a word signifying *deputy*) in relation to their archbishop (Co. Litt. by Harg. 94 a, note (3)); and co-adjutor bishops (of a more recent creation) are also called "suffragan bishops" in relation to the principal bishop of their diocese, *vide post*, bk. IV. pt. II. ch. I.

(*r*) Co. Litt. 94.

(*s*) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*"—5 Rep. 67 a, *Jeffery's Case*; *Sharpley* v. *Overseers of Maplethorpe*, 3 Ell. & Bl. 906.

(*t*) Chitty's Blackstone, vol. i. p. 106, n.; 3 Burn, Ec. L. 60, 7th ed.; Hall. Mid. Ages, vol. ii. p. 205, 7th ed.

(*u*) Seld. of Tith. 9, 4; 2 Inst. 646; *Slade* v. *Drake*, Hob. 296.

(*v*) Camden's Britannia, vol. i. p. ccxxviii.

(*x*) *Bishop of Winchester's Case*, 2 Rep. 44 b.

(*y*) Seld. of Tithes, c. 9.

[tithes was in general *arbitrary*,—every man paying his own to what church or parish he pleased,—it was ordered by a law of King Edgar, that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet*" (*z*). However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister thereof: but if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primaria ecclesia* or mother-church (*a*).

The division of the kingdom into parishes happened probably not all at once, but by degrees; and it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of manors; for it very seldom happens that a manor extends over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, they obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish,—which will well enough account for the frequent intermixture of parishes one with another; for if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands.

Thus parishes were gradually formed, and parish

(*z*) C. 1. (*a*) C. 2.

[churches endowed with the tithes that arose within the circuit assigned. But some lands,—either because they were in the hands of irreligious and careless owners, or were situate in forest and desert places ; or because they were the sites of royal palaces or of antient castles,—were never united to any parish, but remained *extra-parochial* ; and the sea-shore is *primâ facie* extra-parochial, as is also the bed of a public navigable river ; and in all extra-parochial places the tithes are by immemorial custom payable to the king, in trust and confidence that he will distribute them for the general good of the church (*b*).] However, under the provisions of the 20 Vict. c. 19, 31 & 32 Vict. c. 122, 42 & 43 Vict. c. 54, and 56 & 57 Vict. c. 73, extra-parochial places may (at least for certain purposes) be annexed to or grouped or amalgamated with the adjoining parish ; and, on the other hand, army centres may (for limited purposes) be constituted new extra-parochial places.

As a parish is an ecclesiastical division, so the persons who bear the chief authority in the parish, viz., the rector (vicar or perpetual curate) and churchwardens, are also of an ecclesiastical character ; and the nature of their offices and duties is a subject that consequently belongs not to the present part of this work, but to that division of it in which we shall have occasion to treat of the laws of the church (*c*). It is material, however, to observe, here, both as to parishes and parochial officers, that though primarily and properly they have relation to ecclesiastical purposes, yet there are some secular aspects in which they also require to be considered,—for there has been a gradual tendency, more particularly in modern times, to treat a parish as a civil, not less than an ecclesiastical division. Thus, the collection of the poor-rate, or fund for the relief of the poor, and in a general point of view its application also, is *parochial* ; and the case is the same with respect to

(*b*) 2 Inst. 647 ; *Bishop of Winchester's Case*, 2 Rep. 44 ; *Wright* v. *Wright*, Cro. Eliz. 512.

(*c*) *Vide* post, bk. IV. pt. II.

several other species of local taxation (*d*). The affairs also of the parish, used to be, and (subject to the alterations made by the 56 & 57 Vict. c. 73) still are, regulated in a *vestry*; which is, properly speaking, an assembly of the minister, churchwardens, and parishioners,—that is, of such of the parishioners as contribute to the public burdens (*e*)—and which, from being commonly held in the "vestry" adjoining or belonging to the church, takes its name from thence; as the place itself does from the priest's vestures, which are usually deposited there. The vestry is summoned, or called together, by the churchwardens, with the consent of the minister (*f*),—who has been generally considered as entitled, when present, to preside at the meeting (*g*); and its principal duties used to be those of investigating and controlling the expenditure of the parochial funds, and of electing certain parochial officers (*h*). We here speak of the original character of the vestry at common law; but in particular places and by force of special custom (*i*), the vestry may be differently constituted; and sometimes it is regulated by special statute. And there was also the General Vestry Act, commonly called Sturges Bourne's Act (58 Geo. III. c. 69) to be considered (*k*), but which act, together with the amending acts, 59 Geo. III. c. 85, and 16 & 17 Vict. c. 65, has now been repealed by the 56 & 57 Vict. c. 73, so far as regards the parish meetings provided for by that act, being the parish meetings in rural parishes exclusively; and the statutes referred to never, in fact, applied to London or Southwark, or to any parish created under the Church Building Acts for ecclesiastical purposes only, and which did not separately maintain its own

(*d*) See 23 & 24 Vict. c. 51.

(*e*) Steer's Par. L. 253.

(*f*) Steer's Par. L. 252.

(*g*) *Wilson* v. *Math*, 3 B. & Ald. 241; *Mawley* v. *Barbet*, 2 Esp. 687.

(*h*) Steer's Par. L. 257.

(*i*) Steer's Par. L. 260; *R.* v. *Brain*, 3 B. & Adol. 614; *R.* v. *Clerkenwell*, 1 Ad. & Ell. 317.

(*k*) *Reg.* v. *D'Oyly*, 12 A. & E. 139.

poor (*l*). Under these last-mentioned statutes, so far as they were and still continue operative, a vestry is not to be summoned except on three days' notice,—which notice is to be affixed on (or near to) the church door (*m*); and when the vestry meets, a chairman is to be appointed, unless the rector (vicar or perpetual curate) is present; and the chairman has the casting-vote and signs the minutes of the proceedings; and the statutes contain also provisions as to the right of voting, adjusted upon the amount in which the voter is assessed to the relief of the poor (*n*). The constitution of vestries was also, in some places, regulated by an act, commonly called Hobhouse's Act (1 & 2 Will. IV. c. 60) (*o*), which provided for the election (by the ratepayers) of a certain number of vestrymen and auditors, under whose management the parochial accounts were to be kept and audited; but the last mentioned act has been long ago repealed as to the metropolis (*p*); and it never applied to parishes not forming part of a city or town, and not having more than 800 ratepayers, and its adoption was in no case compulsory; and as regards all rural parishes, it has now been wholly repealed by the 56 & 57 Vict. c. 73. There was also the 59 Geo. III. c. 12, which empowered parishes to establish special poor law vestries in supersession of the ordinary parish officers, but subject to the control of the Poor Law Board (*q*); but that statute also has been repealed by the 56 & 57 Vict. c. 73, so far as regards rural parishes.

And here we will observe, that under the 13 & 14 Vict. c. 57, in any parish having a population which exceeds 2,000, the Poor Law Board may, pursuant to a resolution of the vestry, appoint a *paid vestry clerk*; which clerk (in the case of a rural parish) becomes and acts as the clerk of the

(*l*) *The Queen* v. *Barrow*, Law Rep., 4 Q. B. 577.

(*m*) 7 Will. 4 & 1 Vict. c. 45.

(*n*) *R.* v. *Rector of Birmingham*, 7 Ad. & El. 254.

(*o*) *Reg.* v. *Hedger*, 12 A. & E. 157; *R.* v. *Vestry of St. Mary-le-bone*, 5 Ad. & El. 268.

(*p*) 18 & 19 Vict. c. 120, s. 1.

(*q*) *Queen* v. *Green and others*, 21 L. J. (M. C.) 137.

parish council established by the 56 & 57 Vict. c. 73 ; and under the 24 & 25 Vict. c. 125, and (for rural parishes) the 56 & 57 Vict. c. 73, fit offices for the transaction of the parish business may be provided. And on the subject of parishes, it only remains to be observed, that, under the provisions of certain modern statutes for extending church accommodation, and for making more effectual provision for the cure of souls, any parish may be divided into two or more distinct and separate parishes, for all ecclesiastical purposes whatsoever (*r*) ; and in pursuance of these provisions, many such new parishes have been created ; and this principle of the constitution of separate parishes has been adopted and applied, by the 56 & 57 Vict. c. 73, for the purposes of that Act,—the portion of a parish which is within a rural sanitary district and the portion of it which is outside such district (when any parish happens to be so situated) being, each of them, made a separate parish as if they had been so constituted under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61).

II. [The civil division of the territory of England is into counties, and of counties into hundreds, and of hundreds into tithings or towns,—a division of undefined antiquity, and which was not peculiar to England, similar distributions having been in use among the several nations of the continent (*s*). As to the tithings, they were so called, from the Saxon, because *ten* freeholders with their families composed one ; which families all dwelt together, and were sureties (or free pledges) to the king, for the good behaviour of each other,—so that if any offence was committed in their district, they were bound to have the offender forthcoming (*t*) ; and therefore antiently no man was suffered to abide in England, above forty days, unless he

(*r*) Some of the Acts also authorized the establishment of *select vestries* for ecclesiastical purposes; but these vestries were abolished by the 14 & 15 Vict. c. 97, s. 23.

(*s*) Hallam's Middle Ages, vol. ii. pp. 389, 402.

(*t*) Flet. 1, 47.

[were enrolled in some tithing or decennary (*u*). One of the principal inhabitants of the tithing was annually appointed to preside over the rest, being called the tithing man, the headborough, (words which speak their own etymology,) and in some counties, the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing (*x*).

Tithings, towns, or vills, are (or, at least, anciently they were) of the same signification in law, each of them having had originally a church with sacraments and burials,—though that seems to be rather an ecclesiastical than a civil distinction (*y*) ; but the word *town* is now become a generical term, comprehending under it several species and varieties (*z*).]

Towns are distinguished from each other as being either corporate or not corporate,—a town corporate being commonly designated a *municipal corporation* ; and again, there are market-towns, or towns entitled to hold markets, and there are others which have not that franchise ; and, lastly, towns are either cities, boroughs, or common towns. The cities of this kingdom either are or have been the sees of bishops, and yet there is no necessary connection between a city and a see (*a*) ; for though the bishopric be dissolved, yet still the town remaineth a city (*b*). A borough is (or, at least, anciently was) a town that sent burgesses to Parliament (*c*),—a privilege the nature of which we shall explain in that part of the work which relates to Parliament ; but at the present day, a borough is either a municipal one or a parliamentary one (*d*).

(*u*) Mirr. ch. 1, s. 3.

(*x*) Jac. Dict. v. Headborough.

(*y*) Co. Litt. 115 b.

(*z*) *Elliott* v. *South Devon Railway Company*, 2 Exch. 729 ; *London and South Western Railway Company* v. *Blackmore*, Law Rep., 4 H. of L. 611.

(*a*) 1 Woodd. 302 ; Jact. Dict. *in tit.* City.

(*b*) Co. Lit. 109 b.

(*c*) 1 Bl. Com. 114 ; Litt. s. 164 ; Co. Litt. 108 b, 109 a.

(*d*) In the 31 & 32 Vict. c. 41 (The Borough Electors Act, 1868), the term "parliamentary borough" meant a borough which prior to the Representation of the People Act, 1867, returned a member or members to Parliament ; and a

According to Sir Edward Coke, there were in his time, in England and Wales, 8,803 towns, or thereabouts (*e*). [To several of them there are small appendages belonging, called hamlets ; which are taken notice of in the Statute of Exeter (14 Edw. I.), wherein frequent mention is made of "entire vills," "demi-vills," and "hamlets." Entire vills, Sir Henry Spelman conjectures, to have consisted of ten freemen or frank-pledges, demi-vills of five, and hamlets of less than five (*f*). These little collections of houses are sometimes under the same administration as the town itself, and are sometimes governed by separate officers,— in which latter case, they are, for some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish and one tithing ; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings ; and, sometimes, where there is but one parish, there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is (or was) governed by a high constable or bailiff (*g*) ; and formerly there was regularly held in it the hundred court for the trial of causes, though that court

"municipal borough" meant a place subject to the provisions of the 5 & 6 Will. 4, c. 76 (being the Municipal Corporations Act, 1835); and these definitions are accepted in the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), and as so accepted are adopted in the Representation of the People Act, 1884 (48 Vict. c. 3), and in the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23).

(*e*) Co. Litt. 116 a. The town of Westminster was erected into a city by Hen. VIII.,—and it became one of the new bishoprics founded by that monarch. But in the reign of Edw. VI., it was restored to the diocese of London ; and in the reign of Elizabeth, it was made a collegiate church, subject to a dean. See Co. Litt. by Harg. 109 b., n. (3). By the 51 & 52 Vict. c. 11, the property of the dean and chapter was vested in the Ecclesiastical Commissioners, subject as in the Act expressed.

(*f*) Gloss. 274.

(*g*) 32 & 33 Vict. c. 47.

[has now fallen into disuse ; and the hundred was answerable for the riotous demolition of churches, buildings, and machinery, and for plunder of wreck ; but now, under the 49 & 50 Vict. c. 38, the compensation for damage to buildings or other property occasioned by riots is payable out of the police rate ; and (by 51 & 52 Vict. c. 41, s. 3) the county council is made the local authority for the execution of the act. In some of the more northern counties, these hundreds are called wapentakes (*h*).

An indefinite number of hundreds make up a county or shire,—shire being a Saxon word which signifies a division, and county (*comitatus*) being plainly derived from *comes*, the count of the Franks, that is, the earl or alderman, (as the Saxons called him,) of a shire, to whom the government of it was entrusted : which government he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve or shire-reeve, signifying the officer of the shire ; and the whole civil administration eventually devolved upon him. In some counties, there is an intermediate division between the shire and the hundred, as lathes in Kent, and rapes in Sussex,—each of them containing about three or four hundreds a-piece (*i*) ; and these had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeves. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings, which were antiently governed by a trithing-reeve (*j*) ; and trithings still subsist in the large county of York,—where, by an easy corruption, they are denominated ridings,—the north, the east, and the west riding.]

Detached parts of counties,—that is, parts lying inconveniently dispersed,—may (under the 7 & 8 Vict. c. 61)

(*h*) Wilk. Leg. Ang.-Sax. Ll. Edw. c. 33 ; Cowell's Dict. v. Wapentake.

(*i*) For some purposes connected chiefly with magisterial business, certain counties are split up into *divisions*, a principle adopted for general purposes by the Local Government Acts, 1888, 1894.

(*j*) Wilk. Leg. Ang.-Sax. Ll. Edw. c. 34.

be annexed, for all purposes, to the counties of which, for the purpose of parliamentary representation, they form a part; also, liberties (*i.e.*, exempt or privileged parts of counties) may, under the 13 & 14 Vict. c. 105, be united with the counties within which they are situate.

It seems probable that the realm was originally divided into counties, with a view to the more convenient administration of justice; for the judicial business of the kingdom was in early times chiefly despatched in local courts, held in each different county, before the sheriff, as its principal officer (*k*); and as regards crime (and, formerly, but not now, as regards civil actions) (*l*), the trial is, as the general rule, still conducted in the county wherein the offence is alleged to have been committed,—the trial taking place either before the judges and commissioners of assize, on their periodical circuits, or else before the justices of the peace for the county at their quarter sessions; but, under the provisions of modern Acts of Parliament, counties may be united together for the trial of prisoners (*m*).

Another important object connected with the distribution into counties, was (and is) that of parliamentary representation, inasmuch as every county used to send to the House of Commons its own members, called knights of the shire,—who represented their respective counties, as the borough members their respective towns; though, latterly, the larger counties were subdivided, each portion forming (so far as this purpose was concerned) a separate county, and sending its separate representative (*n*); and this subdivision of counties has been recently carried to a great length, and boroughs also have been subdivided, by the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23).

(*k*) Reeves's Hist. Eng. L. vol. i. pp. 6, 7.

(*l*) Orders and Rules of 1883, Order xxxvi.

(*m*) 39 & 40 Vict. c. 57; 40 & 41 Vict. c. 46; 42 & 43 Vict. c. 1.

(*n*) 2 & 3 Will. 4, c. 45, ss. 12, 13, 14, and see 24 & 25 Vict. c. 112, ss. 1, 7.

For the object of local taxation, too, the division into counties is of practical effect and importance ; for as each parish is subject to a rate for the relief of the poor, so is every county subject to a county rate, which is directed to be levied on the occupiers of land within the county, and is applicable for many miscellaneous purposes, such as the maintenance of the rural police, lunatic asylums, gaols, bridges, and the like,—purposes which have now been considerably modified and extended under the provisions contained respectively in the Local Government Act, 1888 (51 & 52 Vict. c. 41), and the Local Government in Rural Parishes Act, 1894 (56 & 57 Vict. c. 73).

[There are three counties *palatine*, viz., Chester, Durham, and Lancaster,—the two former being such by prescription or immemorial custom (*o*), and the county of Lancaster having been created a county palatine by King Edward the Third, in favour of Henry Plantagenet, Duke of Lancaster (*p*), whose heiress being married to John of Gaunt, the king's son, the franchise was afterwards greatly enlarged and confirmed in Parliament, to honour John of Gaunt himself (*q*). Counties palatine are so called *a palatio*,—*scil.*, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had formerly in those counties *jura regalia* as fully as the king in his palace (*r*). That is to say, they might pardon treasons, murders, and felonies ; they appointed judges and justices of the peace ; all writs and indictments ran in their names, as in other counties in the king's ; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis* (*s*). As to which, indeed, it may be remarked, that by the

(*o*) Seld. Tit. Hon. 2, 5, 8.

(*p*) Pat. Rot. 25 Edw. 3, p. 1, m. 18 ; Seld. *ubi sup.* ; Sandford's Gen. Hist. 112 ; 4 Inst. 204.

(*q*) Cart. Rot. 36 Edw. 3, m. 9 ; Pat. Rot. 51 Edw. 3, m. 33 ; *Case of Duchy of Lancaster*, Plowd. 215 ; 7 Rym. 138.

(*r*) Bracton, L. 3, ch. 8. s. 4.

(*s*) 4 Inst. 205.

[antient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried,—*e.g.*, in a court leet, *contra pacem domini* ; in the court of a corporation, *contra pacem ballivorum* ; and in the sheriff's court or tourn, *contra pacem vicecomitis* (*t*). These palatine privileges, so similar to the independent regal jurisdictions usurped by the great barons on the continent during the weak and infant state of the first feodal kingdoms in Europe (*u*), were in all probability originally granted to the counties of Chester and Durham, because these counties bordered upon inimical countries, Wales and Scotland,—in order that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemy's incursions ; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire (the latter now united with Northumberland) ; but these were afterwards abolished, the former in the twenty-seventh year of Henry the Eighth, and the latter in the fourteenth year of Elizabeth. In the twenty-seventh year of Henry the Eighth, moreover, the powers before mentioned of the owners of the three counties palatine were abridged, the reason for their continuance having in a manner ceased (*v*) ;] and in modern times, alterations have taken place in regard to the administration of justice in the counties palatine, which have, for the most part, assimilated them in that respect to the rest of England. Thus, by 11 Geo. IV. & 1 Will. IV. c. 70, the jurisdiction of the court of session of the county palatine of Chester was abolished, and that county was subjected in all things to the jurisdiction of the superior courts at Westminster ; and by the Judicature Act, 1873, the jurisdictions of the Court of Common Pleas

(*t*) Seld. in Heng. Magn. ch. 2.
(*u*) Robertson. Cha. V. i. 60.
(*v*) Inst. *ubi sup.*

of Lancaster and of the Court of Pleas of Durham were respectively transferred to the High Court of Justice by that act established (*x*). And none of the counties palatine any longer remain in the hands of subjects; for the earldom of Chester was united to the Crown by Henry the Third, and has ever since been one of the titles of the sovereign's eldest son (*y*); and the palatine jurisdiction of Durham was taken from the Bishop of Durham by 6 & 7 Will. IV. c. 19 (amended by 21 & 22 Vict. c. 45), and was vested as a separate franchise and royalty in the Crown. [And as regards the county palatine of Lancaster, it was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the Crown from King Richard the Second, and assumed the title of Henry the Fourth; but he was too prudent to suffer his duchy to be united to the Crown, fearing that if he lost the one, he should lose the other also,—for (as Plowden (*z*) and Sir Edward Coke (*a*) observe) "he knew he had the "duchy of Lancaster by sure and indefeasible title, but "that his title to the Crown was not so assured"; and therefore he procured an Act of Parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain and descend, and be administered and governed, in like manner as if he never had attained the regal dignity. And thus it happened that they descended to Henry the Fourth's son and grandson, Henry the Fifth and Henry the Sixth, many new territories and privileges being meanwhile annexed to the duchy (*b*). In the first year of Edward the Fourth, upon the attainder of Henry the Sixth, the duchy was forfeited to the Crown (*c*); and at the same time, an act was passed to

(*x*) 36 & 37 Vict. c. 66, s. 16.

(*y*) Camden's Brittania, vol. iii. p. 46.

(*z*) P. 215.

(*a*) 4 Inst. 205.

(*b*) Parl. 2 Hen. 5, m. 50; 3 Hen. 5, m. 15.

(*c*) *Fisher* v. *Batten*, 1 Ventr. 155; 1 Ventr. 1157.

[incorporate the duchy, to continue the county palatine (making it at the same time parcel of the duchy), and to vest the whole in King Edward the Fourth and his heirs, *kings of England*, for ever, but under a separate governance from the other inheritances of the Crown. Subsequently, in the first year of Henry the Seventh, another act was passed to resume such parts of the duchy lands as had been dismembered from it in the reign of Edward the Fourth, and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, *separate from the Crown of England and the possessions of the same*, as the three Henrys and Edward the Fourth, or any of them, had and held the same (*d*).]

With regard to the Isle of Ely, we may observe that this was never a county palantine, but merely a royal franchise, the Bishop of Ely having been formerly entitled, by grant of King Henry the First, to *jura regalia* within the district, whereby he exercised a jurisdiction over all causes as well criminal as civil (*e*) ; but by the 6 & 7 Will. IV. c. 87, this secular authority of the bishop was taken from him and was vested in the Crown.

[As regards counties *corporate*, otherwise called *counties of cities or towns*, these are certain cities and towns, to which out of special grace and favour the Kings of England have from time to time granted the privilege to be counties of themselves, and to be governed by their own magistrates (*f*),—so that no officers of the county at large have any power to intermeddle therein (*g*).] And as counties corporate constitute no part of the counties in which they are locally situate, so they had formerly, in general, no share in voting for the members to serve for those counties in parliament ; but thirteen of the number were latterly

(*d*) Plowd. 220, 1, 2 ; Lamb. Archeion, 233 ; 4 Inst. 206.

(*e*) 4 Inst. 220 ; *Grant* v. *Bagge*, 3 East, 128.

(*f*) 5 & 6 Will. 4, c. 76, s. 61 ; 45 & 46 Vict. c. 50.

(*g*) 5 & 6 Will. 4, c. 76, ss. 61, 109.

included within their respective counties, so far as regards the right of election for knights of the shire (*h*),—an inclusion which has been largely extended by the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), and by the Local Government Act, 1888 (51 & 52 Vict. c. 41); and by the effect of other statutes (*i*), the inclusion extends to all purposes, such as for the trial of offences committed in the county corporate and other like purposes.

(*h*) 2 & 3 Will. 4, c. 45, s. 17.

(*i*) 38 Geo. 3, c. 52; 14 & 15 Vict. cc. 55, 100; 5 & 6 Will. 4, c. 76; 2 & 3 Vict. c. 72; 17 & 18 Vict. c. 35; 45 & 46 Vict. c. 50.

NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK I.

OF PERSONAL RIGHTS.

THE whole law may be said to be concerned with *rights* and *wrongs*,—these terms being (in a sense) correlatives ; and in our exposition of the law, we shall adopt (as other writers have done) (*a*) that fundamental distinction.

Now rights, when analyzed, are found to consist of several kinds,—regarding either, firstly, a man's own person ; or secondly, his dominion over things ; or thirdly, his private relations ; or fourthly, his condition as a member of the community. And of these varieties of rights, the first are called *personal rights* ; the second, *rights of property* ; the third, *rights in private relations* ; and the fourth, *public rights*. Also, rights imply *duties*. For whatever is due *to* one man is necessarily due *from* another ; for example, the right of one man to receive from another the price of a commodity sold, casts upon the latter the duty of paying that price ; and the general right of each individual to live in personal security, implies the converse duty on the part of others not to subject him to any violence. In the discussion of rights, therefore, it is often necessary to speak also of duties ; and it is under the aspect of duties principally, that certain rights require to be considered.

(*a*) Hale's Analysis (Preface) ; 1 Bl. Com. p. 122.

Wrongs also may be subdivided; but the leading distinction here depends not on the character of the right violated, but on the party who is supposed to sustain injury from its violation,—that is to say, when the violation amounts to an injury to the particular individual only, it is called a civil injury; but when it extends also to injuring the public, it is called a *crime* (*b*). Thus, the withholding of a debt, is a wrong to the individual, and consequently a civil injury; but to deprive a man of his money by theft or robbery, is held to be a wrong also to the public, and therefore a crime.

The method, or order of discussion, we shall adopt, will therefore be as follows:—

Book I. Of Personal Rights.
II. Of Rights of Property.
III. Of Rights in Private Relations.
IV. Of Public Rights.
V. Of Civil Injuries; including also the modes of Redress which the law provides for them.
VI. Of Crimes; comprising also the modes of Criminal Prosecution.

Personal Rights consist of two principal varieties, namely, *Personal Security*, and *Personal Liberty*.

I. And firstly, the right of Personal Security:—Personal Security extends to (and includes) the enjoyment of a man's life and limbs; and of his body, health, and reputation.

[Life is a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the womb: indeed an infant *en ventre sa mère* is, for many purposes, deemed in law to be already born,—and may, *e.g.*, take as legatee or devisee (*c*), or even as heir, but (in the latter case), the presumptive heir will be (and continue) entitled until the actual birth (*d*); also,

(*b*) See 4 Bl. Com. pp. 5, 6.

(*c*) *Pearce* v. *Carrington*, Law Rep., 8 Ch. App. 969; *Occleston* v. *Fullalove*, *ib.*, 9 Ch. App. 147.

(*d*) Co. Litt. 390 a; *Beale* v. *Beale*, 1 P. Wms. 245; *Doe* v *Lancashire*, 5 T. R. 49; *Goodtitle* v. *Newman*, 3 Wils. 526.

[if a woman is quick with child, and by a potion or otherwise designedly killeth it in her womb,—or if any one beat her, with the like design, whereby the child dieth in her womb, and she is delivered of a dead child,—this, though not murder, was by the antient law considered manslaughter (*e*) ;] and although, by the modern law, the offence is no longer homicide in either case, still to procure a miscarriage is, in all cases, a heinous crime ; and if means be used, with intent to kill a child in the womb, and the child is *born alive*, and afterwards dies by reason of the means so used, the case amounts to murder (*f*).

A man's limbs—by which we intend his fighting members,—being given to him for his protection in a state of nature, the deprivation of a man thereof is *mayhem* by the common law ; for to his limbs as to life itself, a man has a natural inherent right.

[A man's life and limbs are held of such high value in the law, that even homicide is pardonable, if committed *se defendendo* ; and, whatever a man does to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is, *e.g.*, prevailed upon to execute a deed, or to do any other legal act, such deed or act, although accompanied with all the requisite solemnities, may be afterwards avoided by him, on the ground of *duress to life or limb*, he having been in fact forced into the deed or act by a well-grounded apprehension of losing life or limb (*g*) ; and such apprehension is also an excuse in law for many misdemeanors, as will appear in the course of these Commentaries (*h*).

Duress to life or limb is of two sorts, either first, duress of imprisonment,—as where a man actually loses his liberty ; or duress *per minas*,—as where the hardship is only threatened and impending ; but in either case, the

(*e*) Bracton, 1, 3, ch. 4.
(*f*) 3 Inst. 50.
(*g*) 2 Inst. 483.
(*h*) *Vide* post, bk. VI.

[duress is duress to the person, as opposed to duress to (or through) a man's goods, with the latter of which species of duress we are not at present concerned. Duress *per minas* is either fear of death (*i.e.*, loss of life), or else fear of mayhem (*i.e.*, loss of limb),—but in either case, the fear must be upon sufficient reason ; that is (as Bracton expresses it), "*non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere etiam in virum constantem ; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum*" (*i*). Therefore, the mere fear of a battery or of being beaten, however well grounded, is not duress to the person,—because for the actual battery itself, a man may have satisfaction in damages ; but for the loss of life or limb no suitable recompense can be made (*k*).

The law not only protects every man in the enjoyment of his life, but also furnishes him with everything necessary for its support ; for, by the theory of our law, there is no man so indigent or wretched, but he may demand, from the more opulent of his fellow citizens, to be supplied with the necessaries of life,—invoking for this purpose the provisions of the Poor Law Acts (*l*).]

Rights of life and of limb can only be determined by death, civil or natural (*m*),—civil death being where a man is outlawed, and becomes, as it were, dead in law (*n*) ; and formerly, civil death also occurred when a man took sanctuary and abjured the realm (*o*), or entered into religion,—in both of which cases he was deemed in law absolutely dead, so that his next heir had his estate. [For such abjured person, equally with the outlawed, was entirely cut off from society ; and a monk, upon entering into religion, might, like other dying men, have made his

(*i*) Co. Litt. 162 a, 253 b ; *R.* v. *Southerton*, 6 East, 144.

(*k*) 2 Inst. 483.

(*l*) *Vide post*, bk. IV., pt. III. ch. II.

(*m*) Co. Litt. 132 a.

(*n*) 3 Inst. 213 ; 4 Bl. Com. 380.

(*o*) Co. Litt. 133 a ; *Newsome* v. *Bowyer*, 3 P. Wms. 37, n. (B).

[last will, appointing executors ; and if he made no will, the ordinary granted administration to his next of kin ; and his executors or administrators might bring the same actions for debts due *to* the religious, and were liable to the same actions for debts due *from* him, as if he were naturally dead (*p*). In short, a monk was so effectually dead in law, that a lease made for the term of the life of one who afterwards became a monk, determined by his entry into religion,—for which reason leases (and other conveyances for life) were usually made to have and to hold for the term of the *natural* life of the grantor or lessor, grantee or lessee (*q*).] But inasmuch as the law of England never assumed cognizance of *profession* in any foreign country, the fact not being triable in our courts (*r*), therefore, after the Reformation, it was held that civil death could no longer take place by profession (*s*), nor (by the effect of 21 Jac. I. c. 28, s. 7, abolishing sanctuaries) by abjuration (*t*) ; nevertheless, it would still take effect on outlawry ; but outlawry on civil process has also now been abolished (*u*).

[It is to be observed also, that in respect of the enjoyment of life and limb, the law of England utterly forbids or excludes the arbitrary power of killing or maiming. "*Nullus liber homo*," says the Great Charter, "*aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ*" (*x*),—which words, "*aliquo modo destruatur*," include, according to Sir Edward Coke (*y*), a prohibition not only of *killing* and *maiming*, but also of *torturing* ; but, of course, *flogging*, for due cause and in proper cases, is permitted by the law,—*scil.*, as part of the punishment, but not in the sense of a *torturing*, of the prisoner. Also, by the statute 5 Edw. III. c. 9, no man

(*p*) Litt. s. 200 ; Co. Litt. 133 b.

(*q*) *Archbishop of Canterbury's Case*, 2 Rep. 48 b ; Co. Litt. 132 a.

(*r*) Co. Litt. 132 b.

(*s*) *Rex* v. *Lady Portington*, 1 Salk. 162.

(*t*) 1 Hale, P. C. 605.

(*u*) 42 & 43 Vict. c. 59, s. 3.

(*x*) C. 29.

(*y*) 2 Inst. 48.

[may be forejudged of life or limb, contrary to the Great Charter and the law of the land; and by the statute 28 Edw. III. c. 3, no man can be put to death without being first brought to answer by due process of law.]

As regards the other rights which are comprised under the general right of personal security,—namely, the enjoyment of a man's whole body, and of his health, and reputation,—these other rights entitle him to security from all corporal assaults, though they amount not to destruction of either life or limb; and to security from all such malpractices as may prejudice or annoy his physical health or vigour; and also to the security of his reputation or good name; but inasmuch as it is to the infringement of these rights rather than to the rights themselves, that the provisions of the law have been directed, therefore they will be more conveniently treated of when we are considering the law of *wrongs* (*z*).

II. [And secondly, the Right of *Personal Liberty* :— Personal liberty consists in the power of moving one's person about to whatsoever place one's own inclination may direct, without imprisonment, hindrance, or restraint, unless by due course of law. And firstly, it is an express provision of the Great Charter, that no freeman shall be taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land (*a*); and other subsequent statutes of an early date also expressly provide, that no man shall be taken or imprisoned on mere suggestion or petition to the king or to his council, unless it be by legal indictment, or other due process of the common law (*b*). Also, by the Petition of Right, (3 Car. I.,) it is expressly declared, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law; and by 16 Car. I. c. 10, it was enacted

(*z*) *Vidè post*, bk. v. and bk. vi.

(*a*) C. 29

(*b*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

[that if any person should be restrained of his liberty by order or decree of an illegal court,—or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council,—he should upon demand of his counsel, have a writ of *habeas corpus* to bring his body before the Court of King's Bench or Common Pleas ; which court was thereupon to determine, whether the cause of the commitment were just; and the court was to forthwith do as justice demanded.] And by the 31 Car. II. c. 2, commonly called the *Habeas Corpus Act*, amended and made more effectual by the 56 Geo. III. c. 100, the methods of obtaining the writ of *habeas corpus* are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison,—*scil.*, excepting where the general law requires and justifies the detention, or where (in exceptional cases), special legislation has so provided. But at the same time, it is a rule with the courts, that they will not grant a *habeas corpus* as of course and without probable cause shown (*c*). However, lest the *habeas corpus* should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by the 1 W. & M. sess. 2, c. 2, that excessive bail ought not to be required ; and by the Indictable Offences Act, 1848 (*d*), and the Bail Act, 1898 (*e*), further provisions have been made for facilitating the bail of accused persons.

[Of great importance to the public is the preservation of this personal liberty ; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, there would soon be an end of all other rights and immunities (*f*) ; and some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made

(*c*) *Hobhouse's Case*, 3 Barn. & Ald. 420.

(*d*) 11 & 12 Vict. c. 42.

(*e*) 61 Vict. c. 7.

(*f*) 1 Bl. Com. p. 135.

[upon the personal liberty of the subject. And yet sometimes, when the state is in real danger, even this may be a necessary measure, as has frequently happened in the case of Ireland (*g*) ; but the happiness of our constitution is, that it is not left to the executive power to determine when the danger is such as to render this measure expedient ; for it is parliament only (or the legislative power) which, by a short suspension of the *Habeas Corpus Act*, can enable the Crown to imprison suspected persons, summarily and without the possibility of their obtaining their discharge. In like manner, the senate of Rome also was wont to have recourse to a dictator, or magistrate of absolute authority, when they judged the republic to be in grave and imminent danger, the decree of the senate in such a case being called the *senatus consultum ultimæ necessitatis* : and by the law of England, recourse is only to be had in cases of extreme emergency to this extreme remedy.

The confinement of the person in any wise, amounts in law to an imprisonment ; *e.g.*, keeping a man against his will in a private house, putting him in the stocks, or forcibly detaining him in the street, is an imprisonment (*h*). And the law so much discourages unlawful imprisonment of every sort, that if a man, while under *duress of imprisonment*, seals a bond or the like, he may afterwards avoid the deed,—*scil.*, the imprisonment being illegal, and not when it is legal (*i*). And every legal imprisonment, that is to say, commitment to prison, must either be by process from the courts, or by warrant from some person having authority to commit ; and when the commitment is under a warrant, the warrant must be in writing, under the hand and seal of him by whom it is given, and must express the cause or causes of the commitment, to be examined into, if necessary, upon a *habeas corpus* ; and if there be no

(*g*) 29 & 30 Vict. c. 1 ; 44 Vict. c. 6 ; and 45 & 46 Vict. c. 25.

(*h*) 2 Inst. 589.

(*i*) *Ibid.* 482.

[cause expressed in the warrant, the gaoler is not bound to detain the prisoner (*k*).

A natural and regular consequence of the right of personal liberty, is, that every Englishman may claim to abide in his own country so long as he pleases, and not to be driven from it or sent out of it, unless by the sentence of the law. The king indeed, by his royal prerogative, may (but, at the present day, hardly will) issue his writ *ne exeat regno*, to prohibit any of his subjects from going out of the kingdom into foreign parts without licence,—for that may be necessary for the public welfare or for the due safeguarding of the commonwealth (*l*) ; but no power on earth, except the authority of parliament, can send a subject *out* of the kingdom against his will ;] for exile was never sanctioned by the common law, except in the case of abjuration of the realm (*m*) ; and though in comparatively modern times, persons, criminals under sentence of "transportation,"—or, now, of "penal servitude" (*n*),—have been sent into places beyond the seas, that has been done either by their own choice, to escape capital punishment, or else it has been under the express authority of some Act of Parliament (*o*). [And the Great Charter expressly declares that no freeman shall be banished (*exuletur*), unless by the judgment of his peers, or by the law of the land (*p*). And by the *Habeas Corpus Act*, 31 Car. II. c. 2, it is enacted, that no subject of the realm shall be sent prisoner into places beyond the seas ; that the person who shall dare to

(*k*) 1 Chitty, Crim. Law, 110 *et seq.*

(*l*) F. N. B. 85.

(*m*) Co. Litt. 133 a.

(*n*) 20 & 21 Vict. c. 3 ; 22 Vict. c. 25.

(*o*) It is said, that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Eliz., when a statute enacted that "such rogues as were dangerous to the inferior people should be banished the realm" (39 Eliz. c. 4 ; see Bar. Ant. Stat. 269) ; and that the first statute in which the word "transportation" is used is the 18 & 19 Car. 2, c. 3, which gave a power to the judges, at their discretion, either to execute, or to *transport* to America for life, the Mosstroopers of Cumberland and Northumberland.

(*p*) C. 29.

[commit another, contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and shall be incapable of receiving the king's pardon :] and that the party injured shall have his civil action also against the wrongdoer, his aiders, advisers, and abettors, whereby he shall recover his costs and also damages to the extent of at least five hundred pounds. [Moreover, the law, in these particulars, is so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service,—excepting, of course, sailors and soldiers, the nature of whose employment of itself implies this exception ;] and the sovereign cannot even constitute a man lord lieutenant of Ireland or Viceroy of India, or even make him a foreign ambassador, against his will,—for that might, in reality, be no more than exile (*q*), under the pretext of an honourable employment.

The right of every citizen to carry arms,—*scil.*, to carry such arms as are proper for his defence,—is a right declared by the 1 W. & M. sess. 2, c. 2 ; and it is in fact, when exercised with sobriety and under due restrictions, an incident to the right of self-preservation ; but to go armed under circumstances which tend to terrify the people, or with an intention to disturb the public peace, is forbidden by the law (*r*) ; also, the training of persons, without lawful authority to the use of arms is forbidden (*s*).

(*q*) 2 Inst. 46.

(*r*) 2 Edw. 3, c. 3; Hawk. Pleas of the Crown, bk. 1, ch. 63.

(*s*) 60 Geo. 3 & 1 Geo. c. 1.

BOOK II.

OF RIGHTS OF PROPERTY.

AS TO PROPERTY IN GENERAL.

The right of property in an individual may be defined as consisting in (or comprising) the free use, enjoyment, and disposal of his possessions, according to the law; and it may otherwise be described as the right or principle by which one man claims and exercises dominion over certain external things to the exclusion of all other individuals therefrom.

In the beginning of the world, as we are informed by holy writ, the all-bountiful Creator gave to man "dominion "over all the earth, and over the fish of the sea, and over "the fowl of the air, and over every living thing that "moveth upon the earth" (*a*). The earth, therefore, and all things therein, under this immediate gift of the Creator, were originally the general property of mankind; and while the earth continued with few inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock, to his own use, such things as his immediate necessities required. However, even in the earliest ages it appears that, by the law of nature, he who first began to use a thing, acquired therein a transient property, the *right* of possession continuing while the *fact* continued (*b*),—so that, *e.g.*, whoever was in the occupation of any definite piece or parcel of land,—for rest, for shade, or the like, acquired for the time being a sort of ownership therein, which it was

(*a*) Genesis, i. 28.

(*b*) Barbeyr. Puff. l. 4, ch. 4.

unjust, and contrary to the law of nature, to deprive him of; although the instant that he quitted the occupation of it, another person might, without injustice, enter into the occupation of it. And when mankind increased, and life grew more complicated and refined, the individual who had constructed for himself a habitation for his own shelter and safety, or who had woven for himself some garment for his own warmth and comfort, was recognized as having some property therein,—for even the brute creation maintained a property in their dwellings.

The idea of property seems therefore to have had its original foundation in *occupancy*, confirmed and strengthened by *labour*. [The reason why *occupancy* should convey the right of property has been variously accounted for,—Grotius and Puffendorf insisting that this right of occupancy as a mode of acquiring property is founded on a tacit and implied assent of all mankind; and Barbeyrac, Locke, and others holding that no such implied assent is necessary, for that occupancy alone without any consent or compact, is sufficient of itself to vest a title to the property.

Property, both in lands and in moveables, having been thus acquired by occupancy, the title so acquired continues in the occupant, by the principles of universal law, until such time as he does some act to abandon it. Therefore, if one possessed of a jewel cast it into the sea, this is such an express dereliction, that a new property in the jewel will be vested in the first fortunate finder that will seize it to his own use again; on the other hand, if the owner hide it privately in the earth, that is no dereliction, and the casual finder of it acquires no property therein,—for the owner hath not by such an act declared any intention to abandon it, but rather the contrary; so if he lose it, or drop it by accident, it cannot be collected from thence that he designed to quit the possession; and therefore in all such cases the property still remains in the loser, who may claim it again of the finder.

[The right of ownership drew after it the right of transfer, a sort of mutual convenience preparing the way for, and suggesting, a commercial traffic in things, by the transfer thereof,—in which transfer was involved both the abandonment of the thing by the previous owner, and its immediate occupancy by the new proprietor. And as regards the transfer of property upon the death of the proprietor, the universal law of almost every nation has either given the dying person a power to dispose of his possessions by will, or else has designated his successor,—the object of this provision of the law being to prevent any vacancy in the possession,—for which reason the Roman civil law considered father and son as one person,—so that, upon the death of either, the inheritance did not so properly descend, as continue in the survivor of them (*c*) ; and as regards the right of the children or nearest relations of the deceased to inherit, it appears that such right was more antient than the right of alienation,—the children or other nearest relations being usually about the man on his death-bed, and becoming therefore naturally the next immediate occupants ; whence also, in the earliest ages, on failure of children, a man's servants, born under his roof, were allowed to be his heirs, being immediately on the spot when he died (*d*).

The power of testamentary disposition followed later on,—and in some countries much later than in others.] With us in England, the general law as it stood in the reign of Henry the Second, was as follows, namely :—As regards a man's *moveable possessions*, he could only dispose of one-third of them to the exclusion of his wife and children ; but as regards his *lands*, these, which before the Conquest, had been fully devisable, ceased to be devisable at all,—until, in the reign of Henry the Eighth, a similar power of disposition by will was recognized; but it was not till after the Restoration of 1660, that the power of

(*c*) Ff. 28, 2, 11. (*d*) Gen. xv. 3.

devising them became universal, the right of the deceased to freely dispose of his whole moveable possessions by will, having also become then fully recognized.

Such having been the origin of property, and of the power of transferring it, it has always been the principal object of the law to protect property from unjust invasion ; thus, by the Great Charter, no freeman may be disseised or divested of his freehold,—or of his liberties, or free customs,—save by the judgment of his peers, or by the law of the land (*e*) ; and by a variety of statutes passed in the reign of Edward the Third (*f*), no man's lands or goods may be seized into the king's hands against the Great Charter and the law of the land ; and a man may not be disinherited, nor put out of his franchise or freehold, by any other, unless he be first duly fore-judged by course of law. And even for the general good of the whole community, no right of property is allowed by our law to be unjustly infringed ; and if a new road, for example, is to be made through the grounds of a private individual, in a case where it would be extensively beneficial to the public, the legislature never permits itself to do this without the consent of the owner of the land, or at least without securing to him a complete indemnification ; or, in other words, the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance ; and all that the legislature does is to oblige the private owner to alienate his possession for a reasonable price (*g*).

(*e*) C. 29.

(*f*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4 ; 28 Edw. 3, c. 3.

(*g*) See, *e.g.* "The Lands Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 18).

PART I.

OF THINGS REAL.

THE subjects of property are things *real* and things *personal*,—things *real* consisting of things substantial and immoveable, and of the rights and profits issuing out of them; and things *personal* consisting of goods and other moveables, and of the rights incident or relative thereto (*h*).

The First Part of the present Book will relate to things Real, and the Second to things Personal,—things real being usually called Real Property or Real Estate, and things personal Personal Property or Personal Estate.

(*h*) Blackstone says, "*things* "*real* are such as are permanent, "fixed and immoveable, which "cannot be carried out of their "place, as lands or tenements— "*things personal* are goods, money, "and all other moveables, which "may attend the owner's person "wherever he thinks proper to "go." (2 Bl. Com. p. 16.)

CHAPTER I.

OF THE DIVISIONS OF THINGS REAL.

THINGS real consist in lands, tenements, or hereditaments. [*Land*, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever,—as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath (*i*) ; and it legally includeth also all castles, houses, and other buildings,—for they consist, saith he, of two things,—namely, *land*, which is the foundation, and *structure* thereupon ; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism ; but such is the language of the law : and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only,—either by calculating its capacity, as for so many cubical yards ; or by superficial measure, as for twenty acres of water ; or by general description, as for a pond, a water-course, or a rivulet,—but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water* (*k*). And so if I grant a certain *water*, though the right of fishing passes, yet the soil does not (*l*). For water, regarded as water, is a moveable wandering thing, and must of necessity continue common by the law of nature,—so that I can only have a temporary and usufructuary property therein (*m*) ; but the land which that water

(*i*) Co. Litt. 4 a ; *Ewer* v. *Hayden*, Crow. Eliz. 476 ; *Cooke* v. *Yates*, 4 Bing. 90.

(*k*) *Challoner* v. *Thomas*, Brownl. 142.

(*l*) Co. Litt. 4 b.

(*m*) *Race* v. *Ward*, 4 Ell. & Bl. 702.

[covers, is permanent, fixed and immoveable, and in this I may have a certain substantial property, of which the law will take notice, and not of the other. Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, is the maxim of the law; upwards, therefore no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs in general to the owner of the surface. So that the word "land" includes not only the face of the earth, but everything under it or over it (*n*). And therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows; and although by the name of a messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of, yet by the name of land, which is *nomen generalissimum*, everything terrestrial will pass (*o*),] —and that is by the common law; apart altogether from the even more extended meaning which may, by particular statutes, be assigned to the word *land* (*p*).

The word *tenement* is of still greater extent, and though in its ordinary acceptation it is only applied to houses and other buildings, yet in its proper and legal sense, it signifies everything that may be *holden*, that is, which can be the subject of *tenure*; and includes not only *land*, but rents, commons, and other rights and interests issuing out of or concerning land (*q*).

But *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression (*r*); for it includes not only lands and tenements, but whatsoever may

(*n*) Shep. Touch. 90; *Raine* v. *Alderson*, 1 Arnold, 329.

(*o*) Co. Litt. 4 a—6 b.

(*p*) 3 & 4 Vict. cc. 105, 106, *et passim*.

(*q*) Co. Litt. 6 a, 20 a, 78 a; *R.* v. *Dersingham*, 7 T. R. 671.

(*q*) Co. Litt. 6 a.; *Moore* v. *Denn*, 2 Bos. & Pul. 251; *Pocock* v. *Bishop of London*, 3 Brod. & Bing. 33.

be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heirloom, or implement of furniture, which by custom descends to the heir together with the house or land, is neither land nor tenement, but a mere moveable : yet, being inheritable, is comprised under the general word hereditament : and so a condition, the benefit of which may descend to a man from his ancestor, is also a hereditament (*s*).

Hereditaments, then, are of two kinds, *corporeal* and *incorporeal*, corporeal consisting of such as may be seen and handled, and incorporeal of such as can neither be seen nor handled, and which exist only in legal contemplation ; or, speaking with a rough accuracy, "corporeal" hereditaments are *land*, and "incorporeal" hereditaments are the rights and profits issuing out of land. It is to corporeal hereditaments that our attention must be first directed ; and whatever is said generally, hereafter, as to the law of real property, is to be understood as referring to its corporeal subjects only, until those of the incorporeal kind present themselves, in their turn, for separate consideration, in a distinct chapter.

(*s*) *Winchester's Case*, 3 Rep. 2 b.

CHAPTER II.

OF TENURES.

In proceeding to treat of corporeal hereditaments or things real, we shall consider, firstly, the tenures by which they may be holden ; secondly, the estates which may be had in them ; and, thirdly, the title by which they are acquired.

And, firstly, as to *Tenures* :—To properly understand tenures, it is necessary to have some previous acquaintance with the nature of feuds, and with the feudal law,—a system established during the middle ages throughout the greater part of Europe, and from thence derived to England, where its spirit still lives in several of her institutions. Now, feuds were introduced under the new dynasties founded by the barbarous tribes, who, during the fourth, fifth, and sixth centuries, poured themselves from Germany and the neighbouring countries into the Roman empire (*t*). In every province which they subjugated, large tracts of territory were divided by lot among the conquerors, some portion falling to the king or general of the invading tribe, and the rest to his soldiers, who received their shares as free and independent property, subject only to the condition of bearing arms, as occasion might require, in the defence of the community from hostile aggression. Of the lands assigned to the sovereign of the tribe, certain portions were afterwards distributed by him among his adherents, and chiefly among his courtiers or companions (*comites*) : but the interest they derived under these grants was not strictly in the nature of property ; it was of a beneficial or usufructuary kind only, a

(*t*) Spelman on Feuds ; Wright on Tenures ; Co. Litt. by Harg. 64 a, n. (1) ; 191 a, n. by Butler

mere stipendiary return for services (commonly services of a military description) which they were expected to render to their master, and subject at some future period to resumption,—the *proprietas*, or actual ownership of the land, being considered as still residing in the sovereign himself.

The species of interest, which we find described sometimes as a *munus* and sometimes as a *benefice* (*u*), was latterly called a *feud*,—a term which signified in the German language a stipendiary estate, and stood in contradistinction to *allodium*, the phrase applied to that independent species of property, before described, which had originally become vested by allotment in the conquerors of the country. There began thus to arise two distinct modes of holding or possessing land; for the stipendiary held *of* (that is, in relation to and in dependence upon) a superior, while the allodialist held of no one, but enjoyed his land as free and independent property.

The interest of the stipendiary or beneficiary tenant did not originally extend beyond his own life, if it was not even determinable at the royal pleasure; but in course of time it gradually improved in stability, and acquired an *hereditary* character, which led by a natural progress to the practice of *subinfeudation*; for the stipendiary, (or feudatory, as he should now rather be termed,) considering himself as substantially the owner, began to imitate the example of his sovereign, by carving out portions of the benefice or feud, to be held of himself by some other person, on terms and conditions similar to those of the original grant; and a continued chain of successive dependencies was thus established, connecting each stipendiary,

(*u*) The portions of land thus distributed were at first revocable at the will of the lord, and were then, it is said, called *munera*. They were afterwards held for some limited time (usually one year), and called *beneficia*. In process of time they began to be granted in perpetuity, and were then called *feuda*. (Spelman on Feuds, 4, 6, 9; Cowell's Interpreter, *in verb.*)

or *vassal* as he was termed (*x*), with his immediate superior or *lord*.

The beneficiary or feudal relation was well suited to times of violence and insecurity, and was attended with great advantage both to the lord and to the vassal,—to the lord, as it secured to him a band of military retainers, attached by duty and by sentiment to his person ; and to the vassal, as it brought him into close connection with a powerful superior, under whom he found shelter from oppression. The effect of this, as regarded the allodial species of property, was remarkable ; for the allodialist, though enjoying a nominal independence, was yet envious of the comparative security of the feudal vassal, and therefore gradually placed himself in a similar relation, changing the nature of his property from allodial to feudal,—which change he effected, by giving up or surrendering his land to some powerful lord, and receiving it back again from him in the shape of a beneficium or feud, to be held upon some kind of service ; or, more simply, by merely *acknowledging* himself to hold as a vassal to some chosen lord, under specified services, as if by the effect of a former grant, which had, in truth, never taken place ; and in one or other of these two ways, allodial lands were largely converted into feudal, although there were many estates which always continued to be held allodially (*y*).

[The feud was conferred by words of gratuitous and pure donation, *dedi et concessi* ; which words would still be the operative words in a modern deed of feoffment ; and the donation was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals,—which delivery perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known, and the law of evidence was in a very elementary state.

The vassal was required to take an oath of *fealty* to the

(*x*) From *gwas*, Celtic for servant.

(*y*) Co. Litt. by Harg. 65 a, n. (1).

[lord, which oath was the parent of our oath of allegiance ; and besides taking that oath, the vassal usually, upon investiture, did *homage* to the lord,—openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that "he did become his *man* (*devenio vester homo*) from that day forth, of life and limb and earthly honour ;" and then he received a kiss from his lord (*z*).]

Besides fealty and homage, the relation of lord and vassal was ordinarily attended with the following further incidents (*a*) :—1. *Aid*, which was originally a mere benevolence voluntarily granted by the vassal to his lord in times of difficulty and distress (*b*), but which in process of time came to be considered as a matter of right. 2. *Relief*, which was a tribute paid to the lord, for "*taking up*" the estate which had lapsed or fallen in by the death of the last tenant : for while the feuds were not properly hereditary, but granted by favour of the lord only to the children of the former possessor, the heir used generally to pay a fine or acknowledgment to the lord for the renewal of the feud ; and this was called a relief, because, in the words of the feudal writers, "*incertam et caducam hereditatem* relevat" ; and this relief afterwards, when feuds became absolutely hereditary, continued to be paid on the death of the tenant, though the original reason of it had ceased to exist. [3. *Fine on alienation*, which was a sum of money paid to the lord by the tenant whenever he had occasion to make over his land to another ; for, the reason of conferring the feud having been the personal abilities of the first feudatory to serve in war, it was not deemed fit that he should, without the lord's consent, transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, to others who

(*z*) Litt. s. 85.

(*a*) Hallam's Middle Ages, vol. i. p. 181, 7th ed.

(*b*) Bract. lib. ii. tr. 1, ch. 16, s. 8.

[might prove less able. And as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service, therefore the lord could no more transfer his seigniory or protection, without the *attornment*, that is to say, the consent of his vassal, than the vassal could transfer his feud without the consent of his lord (*c*),—it being equally unreasonable that the lord should extend his protection to a person to whom he had exception, and that the vassal should owe subjection to a superior not of his own choosing.] 4. *Escheat* and *forfeiture*, whereby the relation between lord and vassal might be dissolved,—escheat being where the tenant in possession of a feud which was transmissible by hereditary descent, died without leaving any heir behind him upon whom, according to the terms of the original grant, the feud might descend, and the feud accordingly reverted to the lord ; and forfeiture occurring where the tenant committed some act which was in violation of his duty to the lord, and which was in fact, a breach of the condition of fidelity on which the grant had been made, and upon which its continuance depended (*d*).

[Feuds, as we have seen, did not originally extend beyond the life of the first vassal ; but in process of time they were universally extended to his *sons* ; and where a feud was given to a man and his *sons*, all his sons used to succeed in equal portions, and (as they died off) their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*e*). And latterly, when such a feud was given to a man and his *heirs*, then, upon the death of the feudatory, his male descendants *in infinitum* were admitted to the succession ; and when any such descendant, who had thus succeeded, died, his male descendants were admitted, and (failing any) such of his male collateral kindred as were of the blood or lineage of

(*c*) Wright's Tenures, 30.
(*d*) Wright's Tenures, 44.
(*e*) Wright, *ubi sup.* 17.

[the first feudatory. But it was an unalterable maxim of the feudal succession, that "none was capable of inheriting a feud but such as was *of the blood of*, that is, lineally descended from, the first feudatory" (*f*); and it is to be added, that while the descent was confined to males, the descent originally extended to all the males alike,—all the sons, without any distinction of seniority, succeeding to equal portions of the father's feud;] which equal division was found upon many accounts inconvenient, particularly by dividing the services, and thereby weakening the strength of the feudal union; and, moreover, *honorary* feuds, or titles of nobility, had been gradually introduced, which were not of a divisible nature, but could only be inherited by the eldest son (*g*); and, at length, in imitation of these last, *military* feuds (or those we are now describing) began also in most countries to descend, according to the rule of primogeniture, to the eldest son only and in exclusion of all the rest (*h*).

[The original feuds were all of a military nature, and in the hands of military persons; but these feudatories found it necessary to commit parts of their feuds to inferior tenants, obliging the latter to such returns (*reditus*, or rents) in corn, cattle, money, or other services, as might enable the chief feudatories to attend to their military duties without distraction. By which means, the feudal holding was extended, these inferior feudatories being under fealty to their immediate lords (*i*); and in process of time, feuds came to be divided into *feuda propria et feuda impropria*, the feud proper comprehending the military feudum, and the feud improper comprising all the others,—namely, such, for instance, as had been originally sold to the feudatory for a price; such as were held upon a money rent, or upon other base and less honourable services, in lieu of military service; such as

(*f*) Wright's Tenures, 183.
(*g*) Feud. ii. 55.
(*h*) Wright, *ubi sup.* 32.
(*i*) *Ibid.* 20.

[were alienable without mutual licence ; and such as might descend indifferently either to males or females (*k*).

The feudal system was not received, at least not universally received, in England, till the reign of William the Norman (*l*)] ; and in fact, it was not until the eleventh or twelfth century that feuds arrived to their full vigour and maturity, even on the continent of Europe (*m*). Moreover, [the introduction of the feudal tenures into England by King William was not effected immediately after the Conquest, but was gradually established by the Norman barons and others, in such forfeited lands as they received from the gift of the Conqueror. And we learn from the Saxon Chronicle (*n*), that in the nineteenth year of King William's reign, an invasion being then apprehended from Denmark, the country was found to be defenceless, which occasioned the king to bring over a large army of Normans and Bretons; and so soon as the danger was over, the king held a great council to inquire into the state of the nation (*o*) ; the immediate consequence of which was the compiling of Domesday Book, which was finished in the next year : and in the latter end of that same year, the king was attended by all his nobility at Sarum, where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person (*p*) :—"*Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt,—terras et*

(*k*) Wright's Tenures, 36.

(*l*) Spelm. Gloss. 218; Bract. l. 2, ch. 16, s. 7.

(*m*) Hallam's Middle Ages, vol. i. p. 192, 7th ed.

(*n*) A.D. 1085.

(*o*) "*Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hâc terrâ ; quo modo incoleretur, et a quibus hominibus.*"—Chron. Sax. *ib.*

(*p*) "*Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.*"—Chron. Sax. A.D. 1086.

[*honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere*" (*q*). The feudal system was in this way formally introduced into this country; and that it now became the almost universal tenure appears by another law of the same council :—" *Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti*" (*r*).

It is probable that, by thus consenting to the introduction of feudal tenures, our English ancestors meant no more than to put the kingdom in a state of defence by establishing a military system, and to oblige themselves, in respect of their lands, to maintain the king's title and territories with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, gave a very different construction to the proceeding, and introduced the rigorous feudal doctrines which had prevailed in the Duchy of Normandy, with all their fruits and dependencies, hardships and services (*s*); and the Norman Conqueror, and his son, William Rufus, kept up with a high hand all the rigours of the feudal doctrines. However, Henry the First, their successor, found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of King Edward the Confessor, (that is, of the antient Saxon system); and accordingly, in the first year of his reign, he granted a charter, whereby

(*q*) Wilkins's Leg. Anglo-Sax. LL. Guil. Con. ch. 52.

(*r*) *Ibid.*, ch. 28.

(*s*) Spelm. of Feuds, ch. 28 Wright's Tenures, 81.

[he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it (*t*). But the charter so granted was not, in fact, observed,—even by Henry himself and the former grievances were revived and aggravated ; until, at length, in the reign of King John, they became so intolerable, as to occasion the barons or principal feudatories of that king to rise up in arms against him ; and which insurrection resulted in the famous charter of Running-mead, which, with some slight alterations, was confirmed by Henry the Third and also by subsequent kings (*u*), and is commonly called Magna Charta, and is cited as 25 Edw. I.]

The general introduction of the feudal system into this country gave rise to the fundamental maxim of the law of England, that all land belonging to any subject is *holden* of some superior, and either mediately or immediately of the sovereign (*x*) ; for in this realm, according to Sir E. Coke, we have not *allodium* (*y*). And as all lands in England are holden, they are consequently called *tenements*, the possessors thereof *tenants*, and the manner of their possession a *tenure* (*z*). Where the tenure was of the sovereign immediately, it was said to be *in capite*, or in chief ; and this was of two kinds, either *ut de honore* (where the land was held of the king as the proprietor of some honour, castle, or manor), or *ut de coronâ* (where it was held of him in right of the crown itself) ; and it is to the latter kind that the term of tenure *in capite* was more especially applied (*a*). But the holding might also be

(*t*) Wilkins's Leges Anglo-Sax. LL. Hen. 1, ch. 1.

(*u*) Sir E. Coke reckons thirty-two instances wherein the charter granted by King John was solemnly ratified. (Hallam's Mid. Ages, vol. ii. p. 452, 7th ed.)

(*x*) Co. Litt. by Harg. 93 a, 1 a, 1 b, 65 a.

(*y*) *Ibid.* 64 a, n. (1).

(*z*) Co. Litt. *ubi sup.* 1 b.

(*a*) Co. Litt. 108 a ; 2 Inst. 64 ; Mag. Char. c. 31 ; 1 Edw. 3, st. 2, c. 13 ; 1 Edw. 6, c. 4 ; F. N. B. 175 ; Bro. Alien. 11 ; Wright's Ten. 163. But see Co. Litt. by Harg. 108 a, n (3).

mediate, that is, in the way of subinfeudation ; [for such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king : and, thus partaking of a middle nature, they were called *mesne* or intervening lords. So that if the king granted a manor to A., and A. granted a portion of the land to B., now B. was said to hold of A., and A. of the king ; or in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord *paramount* ; A. was both tenant and lord, or was a mesne lord ; and B. was called tenant *paravail*, or the lowest tenant (*b*),—and this distinction of mediate or immediate tenancy ran through all the different sorts of tenure.

There subsisted among our ancestors four principal species of lay tenures, distinguished respectively by the *services* which were required to be rendered in respect thereof. For the services, in respect of their quality, were either *free* or *base* ; and in respect of their quantity, they were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier, or a freeman, to perform,—*e.g.*, to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank,—*e.g.*, to plough the lord's land, to make his hedges, to carry out his dung, and the like. *Certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence,—*e.g.*, to pay a stated annual rent, or to plough such a field for three days. *Uncertain* services depended upon unknown contingencies,—*e.g.*, either to do military service in person, or to pay an assessment in lieu of it, when called upon, or to wind a horn whenever the Scots invaded the realm,—both which were free services : or to do

(*b*) 2 Inst. 296.

[whatever the lord should command,—which latter was base, or villein service.]

And it was the various combinations of these services which gave rise to the various kinds of lay tenure ; and of these Bracton (who wrote under Henry the Third) gives the most compendious account of any author antient or modern,—"Tenements are of two kinds, frank-tenement "and villenage ; and of *frank-tenements*, some are held "freely, in consideration of homage, and *knight-service* ; "others in *free-socage* with the service of fealty only, or, "according to some authorities, with fealty and homage (*c*). "And of *villenages*, some are pure, others privileged,— "*Pure villenage* being where a man holds upon terms of "doing whatsoever is commanded of him, nor knows in "the evening what is to be done in the morning, and is "always bound to an uncertain service. There is also "another kind of villenage holden of the king, from the "time of the Conquest, which is called *villein-socage*, and "which is *villenage*, but of a *privileged* sort. Such tenants "of the king's demesnes have the privilege that they "cannot be removed from the land while they do the "services due ; and these villein-socmen are properly "called *glebæ ascriptitii* ; they perform villein services, "but such as are certain and determined" (*d*). This account shows, that there antiently existed the four principal kinds of lay tenure following, that is to say :— *Servitium Militare*,—that is, knight-service, or (in law-French) *chivalry* or *service de chevaler*, where the service was free, but uncertain (*e*) : *Liberum Socagium*, *i.e.*, free socage, where the service was not only free, but certain : *Purum Villenagium*, *i.e.*, pure villenage, where the service was base in its nature, and uncertain : and lastly, *Villenagium Privilegiatum*, *i.e.*, or villein socage, where the service was base but certain ; and this last seems principally

(*c*) Bract. l. 4, ch. 28, § 1.
(*d*) Bract. l. 4, ch. 28, § 5.
(*e*) Spelm. Gloss. 219. Tenure by "knight-service," is called "*fief d'haubert*" in the Mirrour (ch. 2, § 27).

to have prevailed among the "tenants of the king's demesnes."

The four kinds of tenure above enumerated came eventually to be reduced to three only, viz. knight-service, free socage, and *copyhold*,—the copyhold tenure comprising both the species of villenage to which Bracton refers; and these three subsisted in England till the middle of the seventeenth century, and the two last subsist to this day. We will now examine into the character of each.

Firstly, as to *Knight-Service*,—[This was the most universal (and esteemed the most honourable) species of tenure; and it differed very little from a pure and proper feud, being entirely military in its character. To make this holding, it was necessary that the tenement in point of quantity should amount to twelve ploughlands (*f*),—which was called a knight's fee or *feodum militare* (*g*); and the value of which is stated in 1 Edw. II. at 20*l.* per annum (*h*). And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon,—which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold; and if he held only half a knight's fee, he was only bound to attend twenty days; and so in proportion (*i*).

A feud of this tenure was granted by words of pure donation, *dedi et concessi* (*k*); was transferred by investiture or delivering corporal possession of the land, usually called "livery of seisin"; and was perfected by homage and fealty (*l*).] It also drew after it the following consequences, that is to say:—

1. In tenure by chivalry (or knight-service), the land on the death of the tenant passed by *descent* to his heir,—for

(*f*) 2 Inst. 596. A ploughland, *carucata terræ*, was as much as one plough could plough in a year. (Co. Litt. 69 a.)

(*g*) Inst. *ubi sup.*

(*h*) *Ibid.*; Co. Litt. *ubi sup.*

(*i*) Litt. § 95.

(*k*) Co. Litt. 9.

(*l*) Co. Litt. 64 a, 67 b, 68 a, n. (1).

the practice of granting feuds *jure hæreditario* was in use from the Norman Conquest (*m*) ; and in this descent, sons succeeded before daughters, and an elder son before a younger (*n*).

2. If the heir in chivalry was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. Which wardship consisted in having the custody of the body and lands of the heir, *without any account of the profits*, till the age of twenty-one in males, and fourteen in females,—*scil.*, because the law supposed the heir male unable to perform knight-service till twenty-one : but as for the female, Sir E. Coke remarks, she might at the age of fourteen govern an household, and marry a husband, who could do knight's service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen ; yet, if she was then under fourteen, the lord might not only keep her in ward till she attained that age, but (if she remained unmarried) he might, by virtue of the statute of Westm. I., 3 Edw. I. c. 22, keep her land in his custody two years longer (*o*).

[When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*,—that is, the delivery of their lands out of their guardian's hands (*p*). For this they were obliged to pay a fine amounting to half a year's profits of the land,—though this seems expressly contrary to *Magna Charta* (*q*) ; and in consideration of their lands having been so long in ward, they were excused all the reliefs or (if king's tenants) all the primer seisins to be hereafter mentioned (*r*). And in order to ascertain the profits that arose to the crown by these first fruits of

(*m*) Hist. Eng. Law, by Reeves, vol. i. p. 36.
(*n*) Hale's Hist. C. L. ch. 11.
(*o*) Litt. s. 103 ; 2 Inst. 204.
(*p*) Co. Litt. 77 a.
(*q*) 25 Edw. 1, c. 3.
(*r*) Litt. *ubi sup.*

[tenure, and to grant the heir his livery, the itinerant justices (or justices in eyre) had it formerly in charge to make inquisition concerning them by a jury of the county, commonly called an *inquisitio post mortem* (*s*) ; which inquisition was directed to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was, so as thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon (*t*) ; and afterwards a court of wards and liveries was erected, for conducting the same inquiries (*u*).

When the heir thus came of full age he was to receive the order of knighthood, and was compellable to take it upon him, or else to pay a fine ; for no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. Which prerogative of compelling the vassals to be knighted, or else to pay a fine—as expressly recognized in parliament by the statute *de Militibus* (*x*)—was used as an expedient for raising money by many of our best princes, particularly by Edward the Sixth and Queen Elizabeth ; and yet the same prerogative, when put in force by Charles the First, was the occasion of much murmuring ; and eventually that unhappy prince divested himself of this prerogative, which was accordingly abolished by the 16 Car. I. c. 20.]

3. The lord (or other guardian) exercised also over his infant ward the right of *marriage*, or right of disposing of the ward in matrimony (*y*) ; and for this purpose, the guardian might tender to his infant tenant, when of the age of fourteen, a suitable match without *disparagement* (*z*) ; and the infant, if a male, could not refuse and marry

(*s*) Hoveden, sub Rich. 1.

(*t*) 4 Inst. 198.

(*u*) St. 32 Hen. 8, c. 46 ; 33 Hen. 8, c. 22.

(*x*) Statute (*incerti temporis*) 1 Edw. 2, st. 1 (Ruff.).

(*y*) Co. Litt. 88, n. (11), by Harg. ; Hist. of Eng. Law, by Reeves, vol. 1, p. 116.

(*z*) Magna Charta, cc. 3, 6.

elsewhere, without forfeiting *double* the value which the lord might have obtained for the alliance, *duplicem valorem maritagii* ; nor could a female ward refuse, without entitling her guardian to hold her lands by way of penalty, till she attained the age of twenty-one ; and even without tender of a match, the lord was entitled in every case, on the ward's coming of age, to the single value which he might have obtained for his or her marriage (*a*). [This incident of knight's tenure (which was reputed a very sensible hardship) appears to have had its origin in the consent which was required on the part of the lord to the marriage of his *female* wards,—a custom which was founded in good sense (*b*) ; and to exact a price (in some state or other) for the consent, although it offends our modern ideas, was entirely in keeping with early feudal ideas,—and required only to be kept within due limits (*c*) ; and the right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton (*d*) ; and as so declared, it extended to male wards as well as to female wards.

4. *Aids* were another of the incidents of knight's-tenure ; and in England they were principally three : Firstly, to ransom the lord's person, if taken prisoner,—a necessary consequence of the feudal relationship (*e*) ; Secondly, to make the lord's eldest son a knight,—a matter attended formerly with great ceremony and expense ; but this second aid was not payable until the lord's heir was fifteen years old, or capable of bearing arms (*f*) ; and, Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion,—for daughters' portions, which in those days were extremely slender, could not otherwise be provided for, the lord earning no income (out of which he

(*a*) *Lord Darcy's Case*, 6 Rep. 70 b ; *Palmer's Case*, 5 Rep. 126 b ; Co. Litt. 82 a.

(*b*) Bract. l. 2. ch. 37, s. 6 ; Gr. Cust. 95.

(*c*) Wright's Tenures, 97.

(*d*) 20 Hen. 3, c. 6.

(*e*) Feud. l. 2, t. 24.

(*f*) 2 Inst. 233.

[might save up, for his daughters' advancement), and being unable, from the very nature of the tenure thereof, to charge the land with any portions for his children. And it appears that no vassal was exempt from any of these aids,—not even the monasteries (*g*).

The three aids above specified were the only aids which were legitimate incidents of the tenure ; but other aids were exacted by the rapacity of particular lords,—such as aids to pay the lord's debts, and aids to enable him to pay the aids due to his superior lord ; to remedy which abuses, it was ordained by King John's *Magna Charta*, that no aids should be taken by the king of his tenants *in capite* without the consent of parliament, nor in any wise by inferior lords, *save only the three antient ones above mentioned* (*h*),—a provision omitted in the subsequent charters, but re-enacted and confirmed in the 25 Edw. I., when the statute called *Confirmatio Chartarum* was enacted. King John's charter also ordered, that aids should be reasonable (*i*) ; and eventually, by the 3 Edw. I. c. 36 (as regards ordinary tenants in knight's service) and by the 25 Edw. III. stat. 5, c. 11 (as regards tenants *in capite* of the crown), the aid for making the lord's eldest son a knight, and the aid for marrying his eldest daughter was fixed at twenty shillings, the supposed twentieth part of the annual value of a knight's fee with regard to the king's tenants *in capite*. But the other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was on that account never ascertained.

5. Relief was another incident of knight's-tenure,—being, however, only payable in case the heir were of full age on his accession. The amount was at first uncertain, —being in fact arbitrary at the will of the lord (*k*) ; but William the Conqueror by his laws *ascertained* it at 100*s.* (*l*). William Rufus, however, broke through this

(*g*) Philip's Life of Pole, l. 223.
(*h*) Caps. 12, 15.
(*i*) *Ibid.* 15.
(*k*) Wright's Tenures, 99.
(*l*) Wilkins's Leges Anglo-Sax. LL. Guil. Con. cc. 22, 23, 24.

[composition, and again demanded arbitrary reliefs, thereby in effect obliging every heir to purchase anew or *redeem* his land (*m*) ; but his brother, Henry the First, restored the composition, and ordained that the relief to be paid should not be an arbitrary redemption (*n*) ; and eventually the composition of 100*s*. for every knight's fee was universally established (*o*).

6. The tenant in chivalry was also liable to the payment of *primer seisin* ; which, however, was a burthen only incident to the king's tenants *in capite* (*p*). And the *primer seisin* was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir, (provided he were of full age,) one whole year's profits of the lands, if they were in immediate possession ; and half a year's profits, if the lands were in reversion expectant on an estate for life (*q*). This seems to be little more than an additional relief, but grounded upon this feudal reason ; that, by the antient law of feuds, immediately upon the death of a vassal, the superior was entitled to enter and take possession of the land, by way of protection against intruders till the heir appeared to claim it and receive investiture,—during which interval, the lord was entitled to take the profits ; and unless the heir claimed within a year and a day, it was by the strict law a forfeiture (*r*) ; and the heir usually claiming within the year and a day next after the death of the tenant, therefore the king ordinarily used to take the *first fruits* only, that is to say, one year's profits of the land (*s*),—which right of the Crown afterwards gave a handle to the popes—who claimed to be feudal lords of the Church—to claim, in like manner, from every

(*m*) 2 Roll. Abr. 514.

(*n*) "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitimâ et justâ relevatione relevabit eam.*"—Text. Roffens. cap. 34.

(*o*) Glanv. l. 9, c. 4 ; Litt. § 112.

(*p*) Hallam, Mid. Ages, vol. i. p. 183 (7th edit.) ; Stat. Marlb. (52 Hen. 3) c. 16 ; *Prerogativa Regis* (17 Edw. 2), c. 3.

(*q*) Co. Litt. 77 a.

(*r*) Feud. l. 2, t. 24.

(*s*) Staundf. Prerog. 12.

[clergyman in England the first year's profits of his benefice, by way of *primitiæ* or first fruits.]

7. The tenant in chivalry, on arriving at the full age of twenty-one, had the power of *aliening* his land,—or, at all events, parts thereof; but this alienation was originally by way of sub-infeudation only (*t*); and it was not until the statute of *Quia Emptores* (18 Edw. I. st. 1) that the tenant acquired the full power of alienation *inter vivos*; and under that statute the land aliened was to be held by the vendee of the same lord of whom the vendor himself had held it previously; but the tenant in chivalry had no power of aliening his land by will.

8. If the tenant in chivalry held *in capite* he was compelled on aliening his land to pay a *fine*,—for if he aliened without obtaining a licence, it became a question whether the land was not absolutely forfeited (*u*); [but this severity was mitigated by the statute 1 Edward III. c. 12, which declared, that in such a case the lands should not be forfeited, but a reasonable fine be paid to the king; and upon that statute it was settled, that one-third of the yearly value should be paid for a licence to aliene; but if such tenant presumed to aliene without a licence, a full year's value was to be paid (*x*).]

9. The estate of the tenant in chivalry was liable also to the feudal incidents of *escheat and forfeiture*,—incidents which were attended with a peculiar severity in England (*y*); for by *attainder* of treason or felony, the tenant not only forfeited his land, but his blood was held to be corrupted,—whereby every inheritable quality was entirely blotted out, so that no land could thereafter be transmitted from him or through him in a course of descent.

Such were the principal qualities and fruits or incidents

(*t*) Wright's Tenures, p. 154; Co. Litt. by Harg. 43 a, n. (2); 2 Bl. Com. p. 161.

(*u*) 2 Inst. 66.

(*x*) *Ibid.* 67.

(*y*) Hallam, Mid. Ages, vol. i. p. 188, 7th ed.

of the tenure by knight-service properly so-called (*z*) ; but there were also some species of knight-service, improperly so called ; that is to say, Firstly, the tenure by *grand serjeanty*, *per magnum servitium*,—whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person, *e.g.*, to carry his banner, his sword, or the like (*a*), or to be his butler, champion, or other officer, at his coronation (*b*). This tenure was in most other respects like knight-service (*c*) ; only the tenant was not bound to pay aid (*d*), or escuage (*e*) ; and, while tenant by knight-service paid five pounds for a relief on every knight's fee, the tenant by grand serjeanty paid one year's value of his land, were it much or little (*e*) ; moreover, none could hold by grand serjeanty, save of the king only : Secondly, tenure by *cornage*, the distinctive feature in which was the service of winding a horn (*cornu*) when the Scots or other enemies entered the land, in order to warn the king's subjects of this invasion ; and when this tenure was held immediately of the king (*f*), it was a species or sub-variety of grand serjeanty (*g*).

These services, both of chivalry and of grand serjeanty, besides being uncertain as to their quantity or duration, were also all of them personal services, to be performed in the first instance by the tenants themselves ; but the personal attendance growing troublesome, the tenants found various means of evading or compounding it ; first, by sending others in their stead, and afterwards by making a pecuniary satisfaction to the lords in lieu of it, which pecuniary satisfaction came at last to be levied by assessment, at so much for every knight's fee, and therefore was called *scutagium*, or *servitium scuti*, *scutum* being

(*z*) 4 Inst. 192.
(*a*) Co. Litt. by Harg. 108 a, n. (1).
(*b*) Litt. s. 153.
(*c*) *Ibid.* s. 158.
(*d*) 2 Inst. 233.
(*e*) Litt. s. 154.
(*f*) Co. Litt. 107 a.
(*g*) Litt. s. 156.

then a well-known Latin denomination for money ; and it was called, in our Norman-French, *escuage*,—being indeed a pecuniary, instead of a military, service (*h*). This *escuage*, or pecuniary payment in lieu of personal service, appears to have been first taken in the fifth year of Henry the Second, on the occasion of his expedition to Toulouse ; and it soon afterwards became universal ; for we find, that from about this period, when our kings went to war, they levied scutages or assessments on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops : and these assessments, which appear at first to have been arbitrarily levied at the king's mere pleasure, were latterly subjected to the control of parliament, like all other imperial taxes, King John, by his *Magna Charta*, consenting that no scutage should be imposed without consent of Parliament (*i*),—a provision which, although omitted in Henry the Third's charter (*k*), where we only find that scutages or escuages should be taken as they were used to be taken in the time of Henry the Second, that is, in a reasonable and moderate manner, yet afterwards, by the statute 25 Edward I., and many subsequent statutes, was again restored ; and thenceforward no escuage could be levied but by consent of parliament (*l*).

The incidents of knight's-tenure were hard enough in themselves, and could readily be made oppressive ; and at length the humanity of King James the First suggested their abolition,—and the substitution therefor of an equivalent in the shape of an annual fee-farm rent inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's fee, within their respective seigniories,—an expedient that had much to recommend it,

(*h*) Littleton, Coke, and Bracton render it the "service of the shield," *i.e.*, of arms, being a compensation for actual service ; see Co. Litt. by Harg. 68 b, 73 a, n. (2), 74 a, n. (1).

(*i*) "*Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.*"—Cap. 12.

(*k*) Cap. 37.

(*l*) Old Ten. tit. Escuage.

(*m*) Inst. 202.

over the hereditary excise, which was the equivalent eventually adopted by the 12 Car. II. c. 24, being the statute which abolished all the feudal burdens. And by that statute it was enacted, that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, shall be totally taken away :—that all fines for alienations, tenures by homage knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, shall be likewise taken away :—and that all sorts of tenures, held of the king or others, shall be turned into free and common socage, save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty,—a statute, which was a greater acquisition to the civil property of this kingdom that even *Magna Charta* itself ; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour ; but the statute of King Charles the Second extirpated the whole, and demolished both root and branches.

Secondly, as to *Free Socage*,—being the tenure into which, by the statute 12 Car. II., c. 24, all the tenures by knight-service were converted :—Socage, in its most general signification, denotes a tenure by any certain service ; and by our antient writers it is constantly put in opposition to chivalry, or knight-service, where the service was uncertain. Thus Bracton says :—" If a man holds by rent in money, without any escuage or serjeanty, *id tenementum dici potest socagium* ; but if you add thereto any royal service, or escuage, to any the smallest amount, *illud dici poterit feodum militare*" (*n*). And Littleton defines socage to be, where the tenant holds by any *certain* service, in lieu of all other services,—so that they be not services of chivalry, or knight-service (*o*). The service must therefore be certain,

(*n*) L. 2, c. 16, s. 9. (*o*) S. 117.

in order to denominate it socage,—as to hold by fealty and 20*s.* rent; or, by homage, fealty, and 20*s.* rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only, without any other service,—for all these are tenures in socage (*p*).

But, as formerly shown on the authority of Bracton, socage is of two sorts,—*free*-socage, where the services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage (*q*); and of this tenure we are now to speak.

Now *free-socage* is of a strongly feudal character, being created by words of pure donation accompanied with livery of seisin, and being invariably attended with the obligation of fealty at the least, (even where no other service was rendered,) and with all the incidents attaching to feuds in general, and yet falling far short of the severity of the tenure in chivalry, not only as being certain in its services, but also as being comparatively mild in some of its fruits and consequences, as will appear from the following enumeration of the incidents of free-socage tenure.

1. The law of inheritance is the same in socage tenure as in tenure by knight-service, although antiently the law of primogeniture did not apply to the free-socage tenure (*r*).

2. [Wardship is also incident to tenure in socage, but

(*p*) Litt. ss. 117, 118, 119. The term *socage* is by some derived from the French word *soc*, a ploughshare (Co. Litt. by Harg. 86 a, n.; Wright's Ten. 144); and is by others derived from the Saxon word *soc*, a franchise or privilege (2 Bl. Com. p. 80). The term *socmanni* denotes socage-tenants; and the *socmanni* are frequently mentioned in Domesday Book, and are supposed to have been derived from the superior class of Anglo-Saxon *ceorls* (Hallam's Mid. Ages, vol. ii. pp. 386, 481, 7th edit.).

(*q*) Glanv. l. 7, ch. 3.

(*r*) Glanv. l. 7, c. 3; Hale, C. L. c. 11.

[of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship in socage does not, nor ever did, belong to the lord of the fee,—because in this tenure, no military or other personal service being required, there was never any occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but the infant's nearest relation, not being one to whom the inheritance could descend, was to be his guardian in socage, and to have the custody of his land and body till he arrived at the age of fourteen (*s*). At fourteen, this wardship ceased, and the heir might thereupon at once oust the guardian, and call him to account for the rents and profits,—for at that age the law supposed the infant capable of choosing a guardian for himself (*t*). It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones; but as the wardship ceased at fourteen, there was this disadvantage attending it, that young heirs, being left at so tender an age to choose their own guardians, might make an improvident choice. Therefore, when, by the 12 Car. II. c. 24, almost all the lands in the kingdom were turned into socage tenures, the same statute enacted that it should be in the power of any father to appoint a guardian by deed or will, till his child should attain the age of twenty-one (*u*); and if no such appointment be made, the courts interpose to name a guardian, to prevent an infant heir from improvidently exposing himself to ruin (*x*).

3. "Marriage," or the *valor maritagii*, in socage tenure was not any advantage to the guardian, but rather the reverse; for if the guardian caused his ward to marry under the age of fourteen, he was bound to account for

(*s*) Co. Litt. by Harg. 88 b, n. (6).

(*t*) Litt. s. 123; Co. Litt. 89 a.

(*u*) Co. Litt. by Harg. 88 b, n. (15).

(*x*) *Ibid.*, n. (16).

the value of the marriage, even though he took nothing for it (*y*),—the law making guardians in socage account, not only for what they *did* receive, but also for what (but for their own wilful default) they *might* have received on the infant's behalf; but the statute of Charles the Second having destroyed all values of marriage, this doctrine of course ceased with that statute.

4. The tenure in socage was subject, of common right, to aids for knighting the lord's eldest son and for marrying his eldest daughter (*z*); but these were fixed by the statute of Westm. I. (cap. 36) at 20*s.* for every 20*l.* per annum so held, as in knight-service; and they were all abolished by the statute 12 Car. II. c. 24.

[5. Relief was due upon socage tenure, as well as upon tenure in chivalry; but whereas the relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land, the relief payable by a free socager was one year's rent, be the same either great or small (*a*). And therefore Bracton will not allow this to be properly a relief, but "*quædam præstatio* loco relevii *in recognitionem domini*" (*b*); and the 28 Edw. I. c. 1, declared that a free sokeman should give *no relief* eo nomine, but should double his rent after the death of his ancestor, according to that which he had used to pay his lord, and should not be grieved above measure. Again, reliefs in knight-service were only payable if the heir at the death of his ancestor was of full age; but in socage they were due even though the heir was under age,—because the lord had no wardship over him (*c*). The statute of Charles the Second reserves the reliefs incident to socage tenure; and therefore, wherever lands in fee simple are holden by a rent (*scil.* chief rent or quit rent), relief is still due of common right upon the death of a tenant (*d*).

(*y*) Litt. s. 123.
(*z*) Co. Litt. 91 a.
(*a*) Litt. s. 126.
(*b*) L. 2, ch. 37, s. 8.
(*c*) Litt. s. 127.
(*d*) Co. Litt. by Harg. 93 a, n. (2).

[6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to his tenants by knight-service (*e*) ; but primer seisins were entirely abolished by the statute of Charles the Second.]

7. The tenant in socage enjoyed the same right of aliening his lands as the tenant by knight-service ; and, in addition, he might (by custom) have aliened his lands even by will (*f*).

8. Fines for alienation were, apparently, due for lands held *in capite* by socage tenure, as well as for lands held *in capite* by the tenure of knight-service,—the statutes speaking generally of all tenants *in capite*, without making any distinction (*g*) ; but all these fines were taken away by the statute of Charles the Second.

9. Escheat and forfeiture also were incident to tenure in socage, equally as to tenure by knight-service.

Such is the tenure in free socage,—being that under which the bulk of real property in this realm is held at the present day, and which is now better known by its modern denomination of *freehold* ; and it remains only to specify three special sub-varieties of it, viz. *petit serjeanty*, *tenure in burgage*, and *gavelkind*.

[Now *petit serjeanty* bears a great resemblance to grand serjeanty ; for as the one is a personal service, so the other (*scil.* petit serjeanty) is a render of something relative to the king's person (*h*) ; and, by Littleton, petit serjeanty is said to consist in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like (*i*). The services of this tenure being free and certain, it is in all respects free socage (*k*) ; though being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty ; and *Magna Charta*

(*e*) Co. Litt. 77 a.
(*f*) Co. Litt. by Harg. 111 b, n (1).
(*g*) Co. Litt. 43 a ; 2 Inst. 65, 66, 67.
(*h*) Co. Litt. 107 a, 108 b.
(*i*) Litt. Ten. s. 159.
(*k*) Wright's Tenures, 160.

[so regarded it, when it enacted that no wardship of the lands or body should be claimed by the king, in virtue of a tenure by petit serjeanty (*l*).

Tenure in *burgage*, which by Littleton is said to be but tenure in socage (*m*), is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain (*n*) ; and it is indeed only a kind of town socage. Many of these tenements so held in antient burgage are subject to a great variety of customs : the principal and most remarkable of which is that called *Borough-English*, so named in contra-distinction (as it were) to the Norman customs, and which is taken notice of both by Glanvil (*o*), and by Littleton (*p*) ; viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father (*q*). For which Littleton gives this reason, namely, that the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself (*r*) ; and the reason assigned by Littleton is doubtless the true one,—being also in accordance with the practice of the Tartars ; among whom, according to Father Duhalde, as also among other northern nations, this custom of descent to the youngest son also prevails.] There are also other special customs diversely prevailing in lands of burgage tenure, as that in some the wife shall be endowed of *all* her husband's tenements, and not of the third part only (*s*) ; and in others, a man might dispose of his lands and tenements by will (*t*).

Gavelkind occurs as of common right in the county of Kent, almost the whole of which is (or, prior to the Disgavelling Act, 31 Hen. VIII. c. 3, was) subject to this

(*l*) Cap. 27.
(*m*) S. 162 ; Glan. lib. 7, ch. 3.
(*n*) Litt. ss. 162, 163.
(*o*) Lib. 7, ch. 3.
(*p*) S. 165.
(*q*) Year-Book, 36 Hen. 6, 20 ; Co. Litt. by Harg. 10 a, n. (3), n. (4) ; *Muggleton* v. *Barnett*, 2 H. & N. 653.
(*r*) S. 211 ; Year-Book, 8 Edw. 4, 18.
(*s*) Litt. s. 166.
(*t*) S. 167 ; Wright's Tenures, 172.

tenure (*u*). To account for this it should be recollected, that the Kentish men obtained concessions from the Conqueror, by the effect of which they were permitted to retain their ancient liberties ; [and as it is principally here that we meet with the custom of gavelkind, though it was and is to be found in some other parts of the kingdom (*x*), we may fairly conclude that this custom of descent was a part of those liberties. The distinguishing properties of the gavelkind tenure are :—1. The tenant at the age of fifteen can aliene his estate by feoffment (*y*). 2. The estate does not escheat in case of attainder,—the maxim being "the father to the bough, the son to the plough" (*z*). 3. The tenant can (and usually could) always dispose of his lands by will (*a*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*b*),—which was indeed antiently the most usual course of descent all over England] (*c*).

Thirdly, as to *Copyhold* :—This is the villein tenure referred to by Bracton ; but in order to obtain a clear idea of it, it is necessary to consider the origin and nature of *manors*.

[Manors are as antient as the Saxon constitution, though differing antiently from the manors which exist at the present day] (*d*), and which were derived exclusively from the Normans (*e*). A manor, *manerium*, was originally a district of ground held by some lord or great personage,

(*u*) Year-Book, 36 Hen. 6, 20 ; Consuet. Kantiæ (17 Edw. 2, st. 1, ch. 16) ; 32 Hen. 8, c. 29 ; Co. Litt. 140 a.

(*x*) 32 Hen. 8, c. 29 ; Kitch. of Courts, 200 ; Co. Litt. 140 a.

(*y*) Lamb. Peramb. 614 ; *In re Maskell* v. *Goldfinch*, [1895] 2 Ch. 525.

(*z*) Lamb. Peramb. 634.

(*a*) F. N. B. 198 ; *Launder* v. *Brooks*, Cro. Car. 561.

(*b*) Litt. s. 210.

(*c*) Glanvil, l. 7, ch. 3 ; Hale, C. L. ch. 11 ; Analect. l. 2, ch. 7 ; Wright's Tenures, 211 ; Spelm. Cod. Vet. Leg. 355.

(*d*) Co. Cop. ss. 2, 10.

(*e*) *Ibid.* s. 10.

who kept to himself such parts of it as were necessary for his own use, and which were called *terræ dominicales* or *demesne* lands (being those of the *dominus manerii*), and distributed the rest to freehold tenants, to be held of him in perpetuity (*f*). Of the demesne lands, again, parts were retained in the actual occupation of the lord, for the purposes of his family; and other portions thereof were held in villenage (*g*), of which we shall presently speak more at large; and the remaining parts were left uncultivated, and were therefore termed the lord's waste, serving for public roads and for common of pasture to the lord and his tenants. Manors were formerly called also baronies, as they still are called lordships; and each baron or lord was empowered to hold a domestic court, called the court baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes regarding the property of the tenants; and if several manors were held under one great baron, his seigniory over them was termed an *honor* (*h*).

[Villenage was a species of tenure neither strictly feudal, Norman, nor Saxon, but mixed and compounded of them all (*i*). Under the Saxon government, there were, as Sir William Temple mentions (*k*), a sort of people used and employed in the most servile works, and belonging,—both they, their children, and effects,—to the lord of the soil, like the rest of the cattle or stock upon it. On the arrival of the Normans here, it seems not improbable that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them as well as others, to the oath of fealty,—that oath carrying with it a right of protection, and raising the tenant to a kind of estate superior to downright slavery, but inferior to every other

(*f*) Co. Cop. s. 31; *Glover* v. *Lane*, 3 T. R. 447; *Attorney-General* v. *Parsons*, 2 Tyrw. 223.

(*g*) Co. Cop. ss. 12, 14.

(*h*) Co. Lit. by Harg. 108 a, n. (4); Com. Dig. *in. tit.* Honor.

(*i*) Wright's Tenures, 215.

(*k*) Introd. Hist. Eng. 59.

[condition (*l*),—which inferior estate they called villenage ; and the tenants they called villeins, either from the word *vilis*, or else (as Sir Edward Coke tells us) *à villâ*, because they lived chiefly in villages, and were employed in rustic works of the most sordid kind (*m*),—resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned, their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*,—that is, annexed to the manor or land ; or else they were villeins *in gross*, or at large,—that is, annexed to the person of the lord, and transferable by deed from one owner to another (*n*). They could not leave their lord without his permission ; and if they ran away, or were purloined from him, they might, like beasts or other chattels, be reclaimed by action. They held, indeed, small portions of land, by way of sustaining themselves and their families ; but it was at the mere will of the lord, who might dispossess them whenever he pleased ; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and to do any other the meanest offices (*o*),—which services were not only base, but uncertain, both as to their time and as to their quantity (*p*). A villein could acquire no property, either in lands or in goods ; but if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use,—unless he contrived to dispose of them again before the lord had seized them ; for the lord had then lost his opportunity (*q*).

In many places, also, a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord (*r*) ; and, by the common law, the lord might even bring an action against the husband,

(*l*) Wright's Tenures, 217.
(*m*) Co. Litt. 116 a.
(*n*) Litt. s. 181.
(*o*) Litt. s. 172.
(*p*) Bracton, l. 4, tr. 1, ch. 28.
(*q*) Litt. s. 177.
(*r*) Co. Litt. 140 a.

[for damages in thus purloining his property (*s*),—for the children of villeins were in the same state of bondage as their parents; whence they were called in Latin *nativi*, which gave rise to the word *neife*, the appellation of a female villein (*t*). In the case of a marriage between a freeman and a neife, or between a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein,—contrary herein to the maxim of the civil law, *partus sequitur ventrem*; but no bastard could be born a villein,—because, by another maxim of our law, a bastard is *nullius filius*; and as he could *gain* nothing by inheritance, it was hard that he should *lose* his natural freedom by it (*u*). The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord; for if the lord should kill or maim them, he was subject to indictment at the king's suit (*x*).

Villeins might be enfranchised by manumission, which was either express or implied,—express, as where a man granted to the villein a deed of manumission (*y*); implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, or for life, or for years (*z*); for this was dealing with a villein on the footing of a freeman. So, also, if the lord brought an action against his villein, that enfranchised him (*a*),—for as the lord might have had a short remedy against him, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission.

(*s*) Litt. s. 202.
(*t*) Litt. s. 187.
(*u*) *Ibid.* ss. 187, 188.
(*x*) *Ibid.* ss. 189, 194; Co. Litt. 120 b.
(*y*) Co. Litt. 204.
(*z*) *Ibid.* 204—6.
(*a*) Co. Litt. 208.

[Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular, strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good as, in others better than, their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins to enjoy their possessions without interruption in a regular course of descent, the common law, of which custom is the life, now gave to them and to their children, or heirs, title to hold as against their lords,—*scil.*, to have and to hold their lands on performance of the services, in spite of any determination of the lord's will. For, though they were still said to hold their estates in general at the will of their lord, yet it was such a will as was agreeable to the customs of the manor,—which customs were and are preserved and evidenced by the rolls of the several manor courts in which they are entered, or otherwise are preserved by the immemorial and uninterrupted usage of the several manors in which the lands lie. And as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, or copyhold tenants (*b*).

Copyhold tenures (as Coke observes), although very meanly descended, are thus seen to have come of an antient house (*c*),—copyholders being in truth no other but villeins (*d*), who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will.] By the gradual process of manumission also (either voluntary or constructive), the *personal* condition of villenage was at length everywhere commuted into freedom. And at the period of the

(*b*) F. N. B. 12.
(*c*) Co. Cop. 32.
(*d*) F. N. B. 12 C.; Wright's Tenures, 224.

reformation in religion, this change had already become almost complete,—[Sir Thomas Smith testifying (*e*), that in all his time (and he was secretary to Edward the Sixth) he never knew any villein *in gross* throughout the realm; and the few villeins *regardant* that were then remaining were such only as belonged to bishops, monasteries, or other ecclesiastical corporations; and the last traces of villenage in England have been entirely obliterated for above two centuries, the last traces of it which we find recorded in our courts being in the fifteenth year of King James the First (*f*). But the abolition of the personal condition did not involve that of the copyhold tenure, to which it had given birth; and the copyhold tenure is expressly preserved by the statute 12 Car. II. c. 24. In most manors, therefore, we still find that species of tenants called copyholders: whose lands, though substantially their own property, are technically part and parcel of the lord's demesnes, and are entered on the rolls of the customary court of the manor, as being held *at the will of the lord* according to the custom. And a manor (when in its proper and perfect state) also still comprises, according to its antient constitution, some freehold tenants holding of the manor in perpetuity (*g*); also, the court baron (already alluded to), a tribunal whereof the freeholders are the judges, and which is distinct from the customary court of the copyholders, though usually held at the same time and place (*h*). And here we will observe, that though there should be a failure of freehold suitors to the court baron, and consequently in strictness of law an extinction of the manor, yet the jurisdiction of the customary court (which is for the copyhold tenants) would not be affected thereby (*i*).

No freehold, it is to be observed, can be now converted

(*e*) Commonwealth, b. 3, ch. 10.

(*f*) *Pigg* v. *Caley*, Noy, 27; 11 Harg. St. Tr. 342.

(*g*) *Glover* v. *Lane*, 3 T. R. 447 a; *Melwich's Case*, 4 Rep. 26 b.

(*h*) Co. Litt. 58 a; Co. Cop. s. 31.

(*i*) Coke's Tracts, 53.

into copyhold ; of which the chief and most obvious reason is, that the essence of the latter tenure is immemorial custom (*k*) ; on the other hand, a copyhold is capable of being turned into a freehold,—and that, either by the lord's conveying to the copyholder the freehold of the particular premises, or by releasing to him the seignorial estate and rights, or by some other means, express or implied, of *enfranchisement* (*l*).

The copyhold tenure has incident to it, or involves, the obligation of fealty. A copyhold tenement is *descendible* also, where the custom of the manor so permits, to the *heir* ; and as regards the rules of descent, these are, in general, the same as in the case of lands of free socage tenure ; but sometimes it is according to the method in gavelkind, and in others again, it is according to that in borough-English (*m*). But an incident almost peculiar to copyholders,—although it is occasionally met with in freehold or customary freehold lands,—is that of *heriots*. These, which are generally supposed to be a Danish custom (*n*), are a render of the best beast or other article (as the custom may be) to the lord, on the death of the tenant,—which render, if it be considered as a relic of villein tenure, had no hardship in it,—*scil.*, because all the goods and chattels of the villein belonged to the lord, and he might have seized them, even in the villein's lifetime ; but a heriot is now considered one of the most oppressive incidents of tenure. The *wardship* in lands of copyhold tenure also resembles that in socage ; for the lord is not guardian (except by special custom), but the guardianship belongs to the next of kin of the infant to whom the copyhold cannot descend ; and he, like the guardian in socage, is accountable to his ward for the profits (*o*). Moreover, copyhold tenure is, in some manors, subject to *relief* of the

(*k*) *Revell* v. *Joddrell*, 2 T. R. 424.
(*l*) 1 Watk. Cop. 362.
(*m*) *Muggleton* v. *Barnett*, 2 H. & N. 653.
(*n*) 2 Bl. C. 97.
(*o*) 2 Watk. Cop. 101 ; Co. Litt. by Harg, 88 b, n (13).

same nature with that in socage ; and is liable to *forfeiture* and *escheat* (*p*). *Fines*, too, are in general payable to the lord on alienation; and fines also are (or ordinarily are) payable on descents (*q*) ; and the fines are sometimes arbitrary and at the will of the lord, and sometimes they are certain, being fixed by custom ; but, even when arbitrary, the fines must be *reasonable*,—for if otherwise, they might amount to a disinherison of the tenant (*r*) ; no fine, therefore, upon descents and alienations is allowed (unless in particular circumstances) of more than two years' improved value of the estate (*s*).

The tenure which we have been describing is tenure *by copy of court roll at the will of the lord, according to the custom of the manor*,—being the copyhold tenure strictly so called ; but the term *copyhold* is also commonly understood in a larger sense, that is to say, as including every *customary* tenure, or tenure depending on the particular custom of a manor, as opposed to lands of *freehold* tenure (*t*),—which latter tenure may now be considered as the general tenure of the country (*u*). And copyhold, in this larger sense of the word, comprises these two subvarieties, viz., (1) *antient demesne*, and (2) *customary freehold*.

(1.) *Antient demesne* appears to be the same tenure as that described by Bracton, sometimes as *privileged* villenage, and sometimes as *villein-socage*,—being a tenure held of the kings of England from the Conquest downwards ; and the tenants wherein "*villana faciunt servitia, sed certa et determinata*" (*x*). [And *antient demesne* is therefore no other than an exalted species of copyhold, and to which—

(*p*) *Doe* v. *Hellier*, 3 T. R. 169.
(*q*) 1 Watk. Cop. 286.
(*r*) *Hayward* v. *Raw*, 6 H. & N. 308.
(*s*) *Astle* v. *Grant*, Doug. 724 ; *Lord Verulam* v. *Howard*, 7 Bing. 327.
(*t*) Co. Cop. ss. 17, 32 ; *Doe* v. *Huntington*, 4 East, 288 ; *Doe* v. *Llewellyn*, 5 Tyrw. 899.
(*u*) Wright's Ten. 138, 139 ; *Anthony Lowe's Case*, 9 Rep. 123.
(*x*) L. 4, t. 1, ch. 28, s. 5.

[as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty,—Bracton has therefore given a name compounded out of both, and calls it *villanum socagium*.

Antient demesne has been otherwise described or defined as a tenure existing in certain manors, which, though now perhaps granted out to private subjects, were in the hands of the Crown in the times of Edward the Confessor and William the Conqueror, and which by the great survey in the Exchequer, called Domesday Book, appear to have been so (*y*). The tenants in these crown manors were not all of the same order or degree,—some of them, as Britton testifies, having continued for a long time pure and absolute villeins, dependent on the will of the lord (*z*),—and such as have succeeded these in their tenures, now differ from common copyholders only in a few points (*a*); while others of them have been in a great measure enfranchised by the royal favour, and have only remained liable to perform in respect of their lands, some of the better sort of villein services of the determinate and certain class ; as, to plough the king's lands for so many days, to supply his court with such a quantity of provisions, or other stated services,—all of which are now changed into pecuniary rents : and in consideration of these services, these latter had many immunities and privileges granted to them (*b*) ; as to try the right of their property in a peculiar court of their own, called a court of antient demesne (*c*), and by a peculiar process, denominated a writ of *right close* (*d*) ; to be exempt from the payment of tolls or taxes (*e*), from contributing to the expenses of knights of the shire, and from being put on juries and the like (*f*).]

(*y*) F. N. B. 14, 16 ; *Crowther* v. *Oldfield*, Salk. 364.

(*z*) C. 66.

(*a*) F. N. B. 228.

(*b*) 4 Inst. 269.

(*c*) *Doe* v. *Roe*, 2 Burr. 1046 ; *Alden's Case*, 5 Rep. 103.

(*d*) F. N. B. 11.

(*e*) *The Queen* v. *Aylesford*, 2 Ell. & Ell. 538.

(*f*) F. N. B. 14.

Manors of antient demesne accordingly comprise, to this day, both copyholders in the proper and common sense of the term, and also such privileged tenants as those lastly before described, and who are alone properly called tenants in antient demesne (*g*) ; and as regards these last, though their services, like those of pure villeins, were originally base, yet they were distinguished from the latter, in respect that their services were fixed and determinate, and they could not be compelled (like pure villeins) to relinquish their tenements at the lord's will,—"*et ideo*," says Bracton, "*dicuntur liberi*." Britton, also, on account of such their freedom, calls them *sokemans*, and their tenure *sokemanries* ; that is to say, "lands and tenements, which are not held "by knight-service, nor by grand serjeantry, nor by petit, "but by simple services,—being, as it were, lands en- "franchised by the king or his predecessors from their "antient demesne" (*h*) ; and the same name is also given them in Fleta (*i*).

(2.) *Customary freehold* (the other sub-variety of the copyhold tenure to which we referred) exists in many parts of the kingdom, but chiefly (under the name of Tenant-Right estates) in the northern counties. The evidences of title are to be found, as in pure or common copyhold, upon the court rolls ; and here, again, the entries declare the holding to be according to the custom of the manor, though it is not expressed to be at the will of the lord (*k*) ; and in general, all the incidents of customary freeholds are similar to those of copyhold lands properly so called,—and that is so, however diverse may be the customs prevailing within the particular manors.

[Besides the *lay* tenures above described, there is a spiritual tenure which still subsists, as having been

(*g*) F. N. B. 14, B. 11 M., 12 B. ; Co. Cop. s. 32.
(*h*) C. 66.
(*i*) L. 1, ch. 8.
(*k*) Co. Cop. *ubi sup.* ; Co. Litt. by Harg. 52 B. n. (1) ; *Graham* v. *Jackson*, 6 Q. B. 811 ; *Passingham*, app., *Pitty*, resp., 17 C. B. 313.

[preserved by the 12 Car. II. c. 24 ; and this is the tenure of *frankalmoign*,—which tenure of frankalmoign, (*in liberâ eleemosynâ*, or in free alms,) is, that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to it and its successors for ever (*l*). The services which such corporations were bound to render for these lands were not certainly defined ; but only, in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, which is incident to all other services but this (*m*),—because this divine service was of a higher and more exalted nature (*n*). This was the tenure by which almost all the antient monasteries and religious houses held their lands ; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them to this day (*o*).

Tenure in *frankalmoign* appears to have been an old Saxon tenure, and it continued under the Norman revolution, through the great respect that was shown to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all secular services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*p*) ; and this tenure is very distinct from all the others we have described, being not in the least feudal, but merely spiritual ; and, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden, but merely a complaint to the ordinary or visitor to correct it (*q*). But no donation in *frankalmoign* can now (since the statute of *Quia emptores*) be made by a subject ; for every grant in frankalmoign was for the whole inheritance and to hold of the grantor himself (*r*), which since that statute cannot be.

(*l*) Litt. s. 133.
(*m*) *Ibid.* s. 131.
(*n*) *Ibid.* s. 135.
(*o*) Bract. l. 4, tr. 5, cc. 1, 2; Plowd. 242 ; 1 Inst. 94 b.
(*p*) Seld. Jan. 1, 42.
(*q*) Litt. s. 136.
(*r*) *Ibid.* s. 140.

[*Tenure by divine service* was another ancient holding of a spiritual nature ; but in this latter tenure, the services were certain, consisting in the duty or obligation of singing so many masses, or distributing so many alms, and the like, and for which, if unperformed, the lord might distrain, without any complaint to the visitor (*s*).]

(*s*) Litt. s. 137.

CHAPTER III.

OF FREEHOLD ESTATES OF INHERITANCE.

HAVING now considered the varieties of *Tenures*, we have, nextly, to consider the variety of the *Estates* which may be held in lands of freehold tenure. And firstly, an estate in land signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby (*t*); and estate is called in Latin *status*, signifying the condition or circumstance in which the owner stands with regard to his property (*u*). And here it is material to remark, that some kind of actual interest or ownership is implied in the term,—for a *bare possibility*, (such, for example, as the expectation of the eldest son of succeeding, upon his father's decease, to the inheritance of his lands,) will not satisfy the legal idea of an estate (*x*); nor will a mere *power* amount to an estate,—as if a man by will orders his land to be sold by his executors, the executors will take no estate in the land, but only a bare authority over it (*y*); and the same may be said of a mere *revocable licence or permission* (in writing or otherwise) to make a certain use of land (*z*). On the other hand, *a possibility coupled with an interest* may be regarded as an estate,—such, *e.g.*, as the interest which B. takes, under a grant of lands to A. for life, with remainder (if C. shall be living at A.'s death) to B. in fee simple (*a*).

(*t*) Co. Litt. 345 a.

(*u*) 2 Bl. Com. p. 103.

(*x*) *Jones* v. *Roe*, 3 T. R. 93; *Doe* v. *Tomkinson*, 2 Man. & Sel. 170.

(*y*) Co. Litt. 265 b; Co. Litt. 113 a, n. (2).

(*z*) *Wood* v. *Leadbitter*, 13 Mee. & W. 838; *Taplin* v. *Florence*, 10 C. B. 764.

(*a*) 8 & 9 Vict. c. 106, s. 6.

Estates are either *legal* or *equitable* (*b*) ; but it is of the legal estate alone that we shall have occasion at present to speak: and we purpose to consider it in a threefold view: firstly, with regard to the *quantity of interest* which the tenant has in the tenement ; secondly, with regard to the *time* at which that interest is to be enjoyed : and, thirdly, with regard to the *number* and *connection* of the tenants.

Firstly, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either the ownership is to subsist in the tenant during his own life, or during the life of another man ; or it is vested in the tenant and his descendants after him ; or it is circumscribed within a certain number of years, months, or days ; or, lastly, it is infinite and unlimited, being vested in the tenant and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

A freehold estate—*liberum tenementum*, or frank tenement, as it was formerly called,—is an estate either of inheritance, or for life, in lands of free tenure (*c*) ; and it is material to our proper conception of it to remark, that at the common law, and prior to certain alterations in our system to be hereafter explained, an estate of this description in hereditaments corporeal could in general be created or transferred only by the ceremony called *livery of seisin*, attended with proper words of donation,—which ceremony consisted, as its name imports, of a solemn delivery of possession, and was in fact the feudal investiture of which we spoke in the last chapter (*d*). And this method of conveyance is still capable of being used, and is called a *feoffment*, the parties between whom it takes place being called respectively the *feoffor* and the *feoffee*. By the common law, the donation with which the livery is

(*b*) Sanders on Uses, 8 ; Bac. Us. 77.

(*c*) Co. Litt. 43 b.

(*d*) Co. Litt. 49 a ; *Doe* v. *Taylor*, 5 Barn. & Ad. 575.

accompanied might be merely oral ; but, by the Statute of Frauds, (29 Car. II. c. 3,) some instrument in writing, under the signature of the feoffor (or of his agent by writing lawfully authorized), was made essential ; and a deed is now required by the statute 8 & 9 Vict. c. 106.

Estates of freehold are either estates of *inheritance*, or estates *not of inheritance* (*e*) ; and an estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where (after his death without having disposed of it) it is cast by the law upon the persons who successively represent him *in perpetuum* in right of blood, according to a certain established order of *descent*, which we shall have occasion hereafter to explain, and which persons are called his *heirs*, he himself being called the *ancestor*.

An estate of inheritance is otherwise called a *fee* (*f*).

[The true meaning of the word fee, *feodum*, is the same with that of feud or fief, being an estate held of some superior, subject to and upon the condition of rendering him services, the ultimate property resting in the superior, that is to say, in the sovereign,—it being a received and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the crown, the sovereign only having the *absolutum et directum dominium* (*g*) ; and that is the primary sense and acceptation of the word *fee*. But, as Sir Martin Wright observes, the doctrine "that all lands are holden" having been for so many ages a fixed and undeniable axiom, our modern English lawyers do very rarely use the word *fee* in that its primary sense, but generally use it to express the continuance or quantity of the estate (*h*) ; and a *fee*, therefore, in general, signifies an estate of inheritance (*i*), being the

(*e*) *Edward Seymour's Case*, 10 Rep. 97, b.

(*f*) Litt. ss. 1, 9 ; Flet. b. 5, c. 5, s. 27.

(*g*) "*Prædium domini regis est directum dominium, cujus nullus est author nisi Deus.*" — Co. Litt. 1 b

(*h*) Wright's Tenures, 148.

(*i*) Litt. s. 1 ; Flet. l. 5, c. 5, s. 27.

[highest and most extensive interest that a man can have in a feud, *i.e.*, in land (*k*).]

Estates of inheritance are either estates in *fee simple* or estates in *fee tail* (*l*).

I. And, firstly, as regards estates in Fee Simple :—An estate in fee simple (*m*) is that which a man hath to hold to him and his heirs general, that is, his heirs both lineal and collateral, male and female (*n*) ; and this is often called an "estate in fee," without the addition of the word "simple" (*o*) ; and where a man claims an estate in fee simple in possession in a corporeal hereditament (*p*), the precise technical expression is as follows : that he is "seised in his demesne as of fee" (*in dominico suo ut de feodo*),—the words "*in dominico*," or "in his demesne," signifying, that he is seised as owner of the land itself, and not merely of the seigniory or services (*q*) : and the words "as of fee" importing, that he is seised of an estate of inheritance in fee simple, and that he is not the absolute owner, but holds feudally of a superior lord (*r*).

The quality of being always holden of a superior lord is incident to every estate in fee simple belonging to a subject ; but the tenure is no longer (as formerly) of the person from whose immediate grant the fee is derived, but of the person to whose seigniory it has of antient time belonged. This is by the effect of the statute of *Quia emptores* (18 Edw. I. st. 1), which was passed to put a stop to the practice of the subinfeudation of the fee simple ; for according to that practice, a new relation of lord and tenant was, upon each successive alienation of the fee, continually

(*k*) Co. Litt. 1 b.

(*l*) *Edward Seymour's Case*, 10 Rep. 97 b.

(*m*) Co. Litt. 1 a—18 b.

(*n*) Wright's Tenures, 147 ; Co. Litt. 1 b.

(*o*) Litt. s. 293.

(*p*) Where the subject is incorporeal, or where the estate is expectant on a precedent freehold, the words "*in his demesne*" are omitted. Com. Dig. Pleader (C. 35).

(*q*) Fleta, l. 5, ch. 25, s. 18, s. 26 ; Bract. l. 4, tr. 5, ch. 2, s. 2.

(*r*) 2 Bl. Com. 104.

created between the alienor and the alienee ; and the latter consequently held of the former, and not of the chief lord under whom the alienor himself held. But this being found prejudicial to the interests of the chief lords, by exposing them to the frequent loss of their escheats, wardships, and marriages, the statute in question was passed for their protection (*s*) ; and it directed, that, upon all sales or feoffments of land in fee simple, the feoffee should hold the same, not of his immediate feoffor, but of the next lord paramount, of whom such feoffor himself held, and by the same services (*t*) ; and the statute extended also to the king's own tenants *in capite*, holding of him *ut de honore* ; and (as amended by the statute *De Prerogativâ Regis*) (*u*), it extended also to the king's tenants *in capite* holding of him *ut de coronâ* (*x*). Since the statute of *Quia emptores*, therefore, a man who would alienate an estate in fee simple, is no longer able to convey it to be holden of himself ; but his grantee will hold of the same seigniory of which the fee was held immediately before the statute passed (*y*) ; and where, from the lapse of time, no badges of tenure under any subject can now be traced, the land will be considered as holden immediately (as well as ultimately) of the crown (*z*), and by the service of mere fealty,—which is the least and lowest service the law can create (*a*), and being now never exacted, has become a merely nominal obligation (*b*). But in many instances a private lord can still show title to the immediate seigniory,—the ultimate one, as formerly remarked, being in all cases vested in the sovereign ; and when freeholds properly so called are thus held of a private lord, they are properly called *antient freeholds*, to distinguish them from the customary freeholds

(*s*) 2 Inst. 66, 500.

(*t*) *Ibid.* 505.

(*u*) 17 Edw. 2, st. 1, c. 6 ; 34 Edw. 3, c. 15.

(*x*) Wright's Tenures, 163 ; *Taylor* v. *Horde*, Burr. 108.

(*y*) *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*z*) Booth, 135.

(*a*) Co. Litt. 98 a.

(*b*) Co. Litt. by Harg. 68 b, n. (5).

and enfranchised freeholds to be hereafter spoken of in connection with the copyhold lands of manors.

A fee simple is the most extensive state of inheritance that a man can possess (*c*) ; it is the entire property in the land (*d*) : and to it is attached—as an inseparable incident —the right of *alienation*, to the full extent of the fee simple estate or for any smaller estate (*e*); and if he conveys away the whole fee simple, it follows, of course, that the alienee takes an estate to himself and his *own* heirs, answerable to that which the alienor had to him and *his* heirs.

[In case the fee simple owner should grant a lease for twenty-one years, or for one or more lives, the fee simple would still remain in the grantor and his heirs, and upon the determination of the lease for years or lives, the land would revert to the grantor or his heirs, who would hold it again in fee.] Yet sometimes the fee may be in *abeyance*, that is, only in remembrance, intendment, and consideration of the law ; and this happens, where there is no person *in esse*, in whom it may vest and abide, though the law considers it as always potentially existing (*f*) ; and [this may be exemplified in the case of the parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance (*g*). And not only the fee, but the freehold also, may be in abeyance ; as, when the parson dies, the freehold of his glebe is in abeyance until his successor is appointed, when it vests in such successor (*h*).

The word "heirs" used to be necessary in the grant or donation, in order to make a fee or inheritance ; for if the land was given to a man for ever, or to him and his assigns for ever, this vested in him but an estate for life (*i*). This very great nicety about the insertion of the

(*c*) Litt. s. 11 ; Co. Litt. 18 a ; Vaughan, 269.

(*d*) Co. Litt. 18 a ; 2 Saund. 388 b ; *Edward Seymour's Case*, 10 Rep. 97 b.

(*e*) Litt. s. 360 ; Co. Litt. 223 a ; 1 Cr. Dig. 20.

(*f*) Co. Litt. 341 a, 342 b ; Litt. 646, 647 ; *Camoys Peerage Case*, 5 Bing. N. C. 763.

(*g*) Litt. s. 646 ; Co. Litt. 341 a.

(*h*) Litt. s. 647 ; Co. Litt. 342 b.

(*i*) Litt. s. 1 ; *Wright* v. *Dowley*, 2 W. Bl. 1185.

[word "heirs" in all donations of the fee, was a relic of the feudal strictness, by which it was required that the form of the donation should be punctiliously pursued (*k*) ; and as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended originally only to his own life,—unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs.] But now, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, it is no longer necessary to use the word "heirs" in any deed, but it is sufficient to say that the conveyance is "in fee simple."

But the old feudal rule never extended to dispositions *by will*,—in which, as they were introduced at a time when the feudal rigour was fast wearing out, a more liberal construction has always been allowed ; and therefore, by a devise to a man for ever, or to one and his assigns for ever, or to one in fee simple, the devisee has always been construed to have an estate of inheritance,—*scil.*, because the intention of the devisor was sufficiently plain from the words of perpetuity annexed, though he had omitted the legal words of inheritance. If, however, the devise were simply to a man and "his assigns," without annexing any words of perpetuity, the devisee was, at one time, held to take only an estate for life ; but now, by the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 28, where any real estate shall be devised without words of limitation, the devise passes the whole interest of the testator, *unless* a contrary intention appears by the will.

Estates in fee simple are ordinarily sub-divided into three sorts (*l*) :—1, *fee simple absolute ;* 2, *fee simple*

(*k*) Craig, L. 1, t. 9, s. 17.

(*l*) In *Edward Seymour's Case* (10 Rep. 97 b), estates of inheritance are stated to be either *fee simple* or *fee tail* ; and estates in fee simple are either *absolute* (*i.e.*, indeterminable) or *determinable*,—those which are determinable being either *derived out of an estate in fee simple absolute*, or *derived out of an estate in fee tail* ; and as regards those derived out of a fee simple, they are created either by way of *condition*, or by way of

qualified ; and 3, *fee simple conditional*—a division which relates, it is to be observed, to the *quality*, not the *quantity*, of the estate,—for the *quantity* is the same in each (*m*).

1. The fee simple absolute is free from all qualification, and requires no particular remark ; but the two others involve considerations of some intricacy.

2. [A fee simple qualified is such a one as, having a qualification subjoined thereto, must be determined whenever the qualification annexed to it is at an end (*n*). As in the case of a grant to A. and his heirs, *tenants of the manor of Dale* ; here, whenever A. or the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. Thus, when Henry the Sixth granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle ;—in this instance John Talbot had a qualified fee in that dignity, and the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end (*o*).] Such an estate is a fee simple, because it is limited to the heirs general, and may by possibility endure for ever ; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify the donation, it is therefore not an absolute, but a qualified or (as it has occasionally been called) a *base* fee (*p*).

3. A fee simple conditional seems properly to comprise every fee simple granted upon condition (*q*), but the term is usually understood to refer to that particular species

limitation, being called fees simple *conditional* in the former case, and fees simple *limited* or *qualified* in the latter case.

(*m*) Co. Litt. 18 a.

(*n*) *Lord Cardigan* v. *Armitage*, 2 Barn. & Cress. 202.

(*o*) Co. Litt. 27 a.

(*p*) The term *base* fee has also a more restricted application, as denoting that species of qualified fee which is created where tenant in tail conveys his estate tail by a conveyance which bars the issue, but not the remaindermen ; and in the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. 4. c. 74, the meaning of the phrase *base fee* is, by express provisions, so restricted.

(*q*) *Edward Seymour's Case*, 10 Rep. 97 b.

called a conditional fee at common law. [And a conditional fee at common law was a fee restrained in its form of donation to some particular heirs, exclusive of others (*r*) ; as, *e.g.*, to the heirs *of a man's body*,—by which only his lineal descendants were admitted, in exclusion of his collateral heirs ; or, to the heirs *male of his body*, in exclusion both of collaterals and of lineal females also.] And in legal *effect*, such a gift was construed as conferring not an estate descendible to some particular heirs, but as conferring a fee simple, though a fee simple subject to a condition (*s*),—the judges having held, that a gift to a man and the heirs of his body was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body (*t*) ; and they called it a fee simple on condition that the donee had issue,—so that, as soon as the donee had any issue *born*, his estate was supposed, by the performance in some sense, or to some intent, of the condition, to become absolute (*u*), at least for these three purposes :—1. To enable the tenant to aliene the land, and thereby to bar the interest not only of his own issue, but also of the donor in the reversion (*x*) ; 2. To subject the tenant to forfeit his estate for treason, which till issue born he was not able to do, except for the period of his own life,—for otherwise the inheritance of the issue, and the reversion of the donor, might have been defeated (*y*) ; and 3. [To empower him to charge the land with rents, commons, and other incumbrances, so as to bind his issue (*z*). And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious : and the interest in reversion seems to have been the only one which the law, as it then stood, was solicitous to protect, without much regard to the right

(*r*) Flet. l. 3, ch. 3, s. 5.

(*s*) *Nevil's Case*, 7 Rep. 34 b.

(*t*) *Willion* v. *Berkley*, Plowd. 241.

(*u*) *Nevil's Case, ubi sup.*

(*x*) Co. Litt. 19 a ; 2 Inst. 333 ; *Doe* v. *Clark*, 5 B. & Ald. 461.

(*y*) Co. Litt. *ubi sup.* ; 2 Inst. 334.

(*z*) Co. Litt. 19 a.

[of succession intended to be vested in the issue.] However, if the grantee survived his issue, and afterwards died without making any alienation, the land by force of the condition reverted to the donor, and therefore the performance of the condition by the birth of issue did not alter the course of descent till alienation in fact took place (*a*) ; for which reason, and in order to subject his land to the ordinary course of descent, the donee of a conditional fee-simple took care to aliene as soon as he had performed the condition by having issue ; and afterwards (by repurchase of the land) to obtain a fee simple absolute therein that would descend to his heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees,—a subject of no great practical importance, this kind of gift having been long since construed (as we shall presently see) in a different manner ; but, as Lord Coke observes, these things, though they seem antient, are yet necessary to be known,—as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such-like inheritances, which are not within the statutes of entail, and therefore remain as at the common law (*b*).

II. Secondly, as regards estates in Fee-Tail :—The subject of conditional fees leads us, by a natural introduction, to *estates in fee-tail*, or *estates tail*. An estate tail is that which a man hath to hold to him and the heirs of his body, or to him and particular heirs of his body (*c*),—and as to the form of donation, it is the same kind of estate that we have just been considering under the name of fee-simple conditional ; and indeed in that light it was at first contemplated (*d*). But by force of a statute to be presently mentioned, and of the judicial construction which that

(*a*) *Nevil's Case*, 7 Rep. 34 b; *Willion* v. *Berkley*, Plowd. 247.

(*b*) Co. Litt. by Harg. 20 a, n. (3), n. (5) ; *Moore* v. *Lord Plymouth*, 7 Taunt. 614.

(*c*) Co. Litt. 18 b—28 b.

(*d*) *Willion* v. *Berkley*, *ubi sup.*

statute received (*e*), another character has been long attached to an estate thus limited—viz. that of an estate *tail*, the incidents or consequences of which are very different from those of a fee-simple conditional. The history of the change is as follows :—

[It was doubtless the inconveniences which attended a limited and fettered inheritance which induced the judges to construe a limitation to a man and the heirs of his body as a conditional estate in fee simple ; but the nobility put a stop to this construction of the limitation, by procuring the statute of Westminster the second (commonly called the statute *De donis conditionalibus*) to be made (*f*) ; by which statute it was enacted, that thenceforth the will of the donor should be observed *secundùm formam doni*, so that where lands were given to a man and the heirs of his body, they should, notwithstanding any alienation by the donee, go to his issue, if there were any, and if issue failed, should revert to the donor ; and the judges soon afterwards determined that, under such a limitation and upon the true construction of the act, the donee had no longer a conditional fee simple, but a *fee-tail* (*g*), leaving in the donor the ultimate fee simple (*h*) ; and tenant in fee-tail is by virtue merely of that statute, and which is commonly called the statute *De donis* (*i*).

The expectant estate of the donor by virtue of this statute, is considered as of a different nature from the right which belonged, at the common law, to the donor of a fee simple conditional ; for the reverter of the latter was only in possibility, being dependent on the contingency of the donee's estate determining by force of the condition ; but the reversion of the donor of an estate tail

(*e*) 2 Inst. 335.

(*f*) 13 Edw. 1 (Stat. Westm. Sec.), c. 1 (A.D. 1285).

(*g*) The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists ; among whom it signified any mutilated or truncated inheritance, being derived from the barbarous verb *taliare*, to cut.—Spelm. Gloss. ad verb. Feodum ; Craig, l. 1, t. 10, ss. 24, 25.

(*h*) Inst. *ubi sup.*

(*i*) S. 13.

[is the residue of a fee, and therefore a fixed or vested interest (*k*).

By the express provisions of the statute *De donis*, the alienation of the tenant in tail was not to defeat the succession of the issue, or the reversion of the donor and his heirs ; but such alienation was not a void act,—for the leases of tenant in tail, though liable to be defeated after his death by those claiming under the entail, were in other respects effectual ; and if he conveyed his estate to another in fee simple, the alienee took a *base fee*,—that is to say, a fee simple to hold as long as the tenant in tail lived or had heirs of his body,—but such fee might be avoided (on the death of the tenant in tail) by the entry of his issue (*l*).

Estates-tail are either *general* or *special*. An estate in tail-general, is where lands and tenements are given to one and the *heirs of his body* begotten ; and this is called tail-general, because, how often soever such donee in tail be married, his issue, by all and every such marriage, is, in successive order, capable of inheriting the estate tail *per formam doni* (*m*). An estate in tail-special, is where the gift is restrained to the heirs of the donee's body by a particular person ; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten* ; here no issue can inherit but such special issue as is engendered between them two ; not such as the husband may have by another wife : and therefore it is called a special tail. And here we may observe, that where an estate in frankmarriage (*in libero maritagio*) was given to a man on his marriage with the kinswoman of the donor, the donee was a tenant in special tail,—the word "frankmarriage" not only creating an inheritance, but likewise limiting that inheritance to the issue of the particular marriage (*n*).

(*k*) Inst. *ubi sup.*; Co. Litt. 22 a; Bac. Abr. tit. Remainder and Reversion.

(*l*) Co. Litt. by Butler, 331 a, n. (1); *Seymour's Case*, 10 Rep. 97 b; *Walsingham's Case*, Plowd. 557.

(*m*) Litt. ss. 14, 15.

(*n*) 2 Black. 115 ; Litt. ss. 19, 20.

[Estates in "general" and "special" tail are further diversified by the distinction of sexes in such entails,—for both of them may either be in tail *male* or in tail *female* ; and if lands be given to a man and the *heirs male of his body* begotten, this is an estate in tail male general ; but if to a man and the heirs *female of his body on his present wife* begotten, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them ; nor *è converso* the heirs male, in case of the gift in tail female (*o*). Thus, if the donee in tail male hath a daughter who dies leaving a son, such grandson in this case cannot inherit the estate tail,—for he cannot deduce his descent wholly by heirs male (*p*) ; and if a man hath two estates-tail, the one in tail male, the other in tail female ; and he hath issue a daughter, which daughter hath issue a son ; this grandson can succeed to neither of the estates,—for he cannot derive his descent either wholly in the male or wholly in the female line (*q*).

As the word *heirs* used to be necessary, in a deed, to create a fee simple, so the word *body* (or some other word of procreation) (*r*) used to be necessary to make it a fee-tail ; and therefore, if either the words of inheritance or the words of procreation were omitted in the grant, albeit the others were inserted, this would not make an estate-tail. For example, if the grant by deed were to a man and the *issue of his body*, to a man and his *seed*, to a man and his *children* or *offspring*,—all these would be but estates for life, the words of inheritance, "his heirs," being wanting (*s*) ;] and a gift to a man and his *heirs male* or *heirs female*, was an estate in fee-simple, and not in fee-tail, there being no words to ascertain the *body* out of which they should issue (*t*) ; and every estate in fee, which was not in tail,

(*o*) Litt. ss. 21, 22.
(*p*) *Ibid.* s. 24 ; Co. Litt. 25 b.
(*q*) *Ibid.*
(*r*) *Beresford's Case*, 7 Rep. 40.
(*s*) Co. Litt. 20 ; *Froymorton* v. *Wharrey*, 2 W. Bla. 728.
(*t*) Litt. s. 31 ; Co. Litt. 7 a ; *Abraham* v. *Twigg*, Cro. Eliz. 748 ; *Earl of Oxford's Case*, W. Jones, 105.

must of necessity have been a fee simple (*u*), and upon such a limitation as last supposed, heirs both male and female would inherit (*x*),—for a descent in fee simple is inconsistent with a restriction to heirs of either sex. But now, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, it is no longer necessary for the creation of an estate tail, to use the words "heirs of the body," but it suffices to say "in fee tail," with or without the word *male* or *female*, as may be required ; and these substituted phrases would always have sufficed in a *will*, a greater indulgence having always been allowed in these ; also an estate tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*, or by any other expression which is sufficient to indicate the intention to create that species of estate (*y*).

We have seen that lands cannot (since the statute *Quia emptores*) be conveyed in fee simple, to be holden of the grantor ; but it is otherwise with respect to a gift in tail. For if a tenant in fee simple grants an estate tail out of it, (the reversion remaining in the donor,) the donee in tail shall hold of the donor, by fealty and such other services as may be reserved ; or if none be reserved, then by fealty and such other services as the donor himself renders to the next lord paramount (*z*) ; but the tenure which, in such a case, is created between the donor and the donee, is described as *imperfect*, whereas that which subsists between the tenant in fee and the chief lord is *perfect* (*a*).

[Estates tail proved to be the occasion of infinite difficulties and disputes (*b*),—children growing disobedient,—because they knew they could not be disinherited ; farmers being ousted of their leases,—because

(*u*) Co Litt. 27 b.

(*x*) Litt. *ubi sup.*

(*y*) 2 Bl. Com. p. 115 ; Co. Litt. 9 b, 27 a ; *Good* v. *Good*, 7 El. & Bl. 295.

(*z*) Litt. s. 19 ; Co. Litt. 23 a, 93 a, 143 a, 68 b, n. (5), by Harg. ; *Bingham's Case*, 2 Rep. 92 b.

(*a*) Co. Cop. s. 31.

(*b*) *Chudleigh's Case*, 1 Rep. 131 b.

[such leases, if permitted to be valid against the issue in tail, would have virtually disinherited the issue ; and creditors, being defrauded of their debts,—because if the tenant in tail could have charged his estate with their payment, he might by mortgaging it for as much as it was worth have defeated his issue ; and innumerable latent entails were produced, to deprive purchasers of the lands they had fairly bought ; treasons also were encouraged,—estates tail not having been originally liable to forfeiture ; and, in fact, entails were justly branded as the source of new mischiefs unknown to the common law, and were almost universally considered as the common grievance of the realm (*c*). But as the nobility had procured their establishment, so they contrived to secure also their maintenance,—and it was not until nearly two hundred years after the statute *De donis*, namely, in the twelfth year of Edward the Fourth (*d*), that an indirect means of barring or defeating the entail was invented, namely, the *common recovery*, which in that year was declared by the judges to be a sufficient bar of an estate tail (*e*).

The declaration just referred to was a declaration of the judges in *Taltarum's Case* (*f*), wherein it was (in effect) determined, that a common recovery suffered by tenant in tail should convert his estate into a fee simple absolute, and bar all persons claiming the estate tail, or any estate ulterior thereto (*g*) ; and in consequence of that declaration, a common recovery came to be looked upon as the legal mode of conveyance, by which a tenant in tail might effectually dispose of the fee simple of his lands and tenements (*h*).

(*c*) Co. Lit. 19 b ; *Mary Portington's Case*, 10 Rep. 38.

(*d*) A.D. 1472.

(*e*) *Chudleigh's Case*, 1 Rep. 131 ; *Mildmay's Case*, 6 Rep. 40.

(*f*) Year Book, 12 Edw. 4, 14, 19 ; Bro. Abr. tit. Taile, 36 ; Hist. Eng. Law, by Reeves, vol. iii. p. 328.

(*g*) *Martin* v. *Strachan*, 5 T. R. 107, n. ; Willes, 449 ; *Smith* v. *Clifford*, 1 T. R. 738.

(*h*) 11 Hen. 7, c. 20 ; 7 Hen. 8, c. 4 ; 34 & 35 Hen. 8, c. 20 ; 14 Eliz. c. 8 ; 14 Geo. 2, c. 20.

[The estate tail was also attacked by divers subsequent statutes; firstly, by the 26 Hen. VIII. c. 13,—whereby all estates "of inheritance" were declared forfeited to the king upon any conviction of high treason, in which words estates-tail *in possession* were included; secondly, by the 32 Hen. VIII c. 28,—whereby certain *leases* made by tenants in tail not tending to the prejudice of the issue, were allowed to bind the issue in tail, though not the remainderman or reversioner (*i*); and thirdly, by the 32 Hen. VIII. c. 36,—whereby it was declared that the mode of conveyance called a *fine* (which had been introduced by the 4 Hen. VII. c. 24), when duly levied by a tenant in tail, bound not only the tenant in tail himself, but also barred his heirs claiming under the entail. Also, by the 33 Hen. VIII. c. 39, s. 75, estates-tail were rendered liable to be charged with the debts of the tenant in tail due to the king by record or specialty contract; and by the 43 Eliz. c. 4, the tenant in tail was enabled to convey the fee simple to a charitable use (*k*); and by the 21 Jac. I. c. 19. s. 12, the estate tail, in case the tenant in tail was made a bankrupt, became and was liable for his debts generally.] And ultimately, by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), a tenant in tail was enabled, by a mere ordinary deed of conveyance, provided it was *duly enrolled* in chancery (now the central office) within six months after its execution, to aliene the lands entailed in fee-simple absolute, or for any less estate,—thereby either *in toto* or *pro tanto* barring himself and his issue, and (in general) the remaindermen and the reversioners as well (*l*),—subject only to this express provision of the act, namely, that where, under the same settlement, there is subsisting a prior estate of freehold, or a prior estate for years determinable with life, it shall not be competent for the tenant in tail to bar any estate

(*i*) Co. Litt. 45 b.

(*k*) *Attorney-General* v. *Rye*, 2 Vern. 453; Chan. Prec. 16.

(*l*) 3 & 4 Will. 4, c. 74, s. 15.

taking effect upon the determination of the estate tail (that is to say, the remainderman and the reversioner),—without the consent of the tenant of such prior estate, and who receives for that reason the appellation of *protector of the settlement* (*m*), but neither a dowress nor a bare trustee is to be the protector (*n*). The 3 & 4 Will. IV. c. 74, in extension of the 32 Hen. VIII. c. 28, above referred to, also enabled the tenant in tail *in possession* to create certain leases, without any enrolment of the indenture of lease,—a provision which is still in force,—although it has been superseded in practical effect by the more comprehensive provisions as to leases (and sales) which are contained in the Settled Estates Act, 1877 (40 & 41 Vict. c. 18) and in the Settled Land Act, 1882 (45 & 46 Vict. c. 38)—two modern acts, the provisions of which are of such importance and wide applicability as to demand a more particular treatment (*o*). And here it only remains to be mentioned, that, by the 1 & 2 Vict. c. 110, s. 13, entailed estates were made equally liable with fee simple estates to satisfy the judgment debts of the tenant in tail, it being only required for this purpose that execution on the judgment against the tenant in tail should issue during the judgment debtor's life,—a particular respect in which the estate tail still continues (as regards general debts) differently situated to an estate in fee simple; and a fee tail is not liable, although a fee simple is liable, under the 3 & 4 Will. IV. c. 104, as legal assets for the payment of debts in an administration of the deceased tenant's estate in the Chancery Division of the High Court; but in the Bankruptcy Division, it would be liable (or could be made available for the payment of the debts of the tenant in tail) equally with the fee simple estates of the debtor (*p*).

(*m*) 3 & 4 Will. 4, c. 74, s. 22.
(*n*) *Ibid.* ss. 26, 27.
(*o*) Book ii., Pt. i., ch. xxiv.
(*p*) 46 & 47 Vict. c. 52, s. 56.

CHAPTER IV.

OF FREEHOLD ESTATES NOT OF INHERITANCE.

FREEHOLD estates which are not of inheritance, but *for life* only, are nextly to be considered ; and of these, some are *conventional*, and others are merely *legal* (*q*),—estates for life expressly created by some deed or will being termed *conventional*, and estates for life which are otherwise created, or which arise without any express creation of the party, being termed *legal*, in contradistinction from the *conventional*.

I. *Conventional* Life Estates,—or Life Estates in general : —These arise when an estate is limited to a man to hold for the term of his own life, or for that of any other person, or for more lives than one,—in any of which cases, he is styled tenant for life ; but when he holds the estate for the life of another, he is usually called tenant *pur autre vie* (*r*). These estates for life are, like inheritances, of a feudal nature : and they were for some time the highest estate that any man could have in a feud,—for feuds were not, at first, hereditary ; and as in an estate of inheritance in possession, the feudal tenant is said to be "seised in his demesne *as of fee*," so in an estate for life in possession, he is said to be "seised in his demesne *as of freehold*."

[Estates for life may also be created by a grant which does not define or limit the specific estate intended by the grant. As if one, by deed, grants to A. B. the manor of Dale, this makes A. B. tenant for life (*s*) ; for the grant will be construed to be as large an estate as the words of the donation will bear, *i.e.*, an estate for life ; and shall be construed to be an estate for the life *of the*

(*q*) Wright's Tenures, 190.
(*r*) Litt. s. 56.
(*s*) Co. Litt. 42 a, 183 a.

[*grantee* (*t*), an estate for a man's own life being more beneficial and of a higher nature than for any other life, and the rule of law being that all grants shall, unless in the case of grants by the Crown, be taken most strongly against the grantor (*u*).

Estates for life endure, in general, as long as the life for which they are granted; but some estates for life may determine sooner; for if an estate be granted to a woman during her widowhood,—or to a man until he be promoted to a benefice,—in these and similar cases, whenever the contingency happens,—when the widow marries, or when the grantee obtains a benefice,—the respective estates are absolutely determined and gone (*x*),—although, while they subsist, they are reckoned as estates for life (*y*).]

On the grant of an estate for life, or upon a lease for life, a tenure (of the imperfect kind) is created between the lessor and the lessee, and the lessee will hold of the lessor by fealty and such other services as may be reserved; and if no others be reserved, the lessee will hold by fealty only (*z*).

The estate for life has the following incidents:—

1. Every tenant for life, unless restrained by covenant or agreement, may (of common right) take, upon the land demised to him, reasonable *estovers* or *botes*, that is, an allowance of wood for fuel, repairs, and the like,—the term *estovers* being derived from the French word *estoffer*, to furnish, and *bote* (which is of Saxon derivation) being synonymous with estovers. And when this allowance is for fuel, it is called house-bote, and sometimes fire-bote; when for making and repairing the instruments of husbandry, it is called plough-bote and cart-bote; and when for repairing hedges and fences, it is called hay-bote or hedge-bote (*a*).

(*t*) Co. Litt. 42 a, 183 a.
(*u*) Co. Litt. 36 a, 183 a.
(*x*) Co. Litt. 42 a; *Boraston's Case*, 3 Rep. 19 a.
(*y*) Co. Litt. 42 a.
(*z*) Co. Litt. 143 a, 23 a, 93 a, 68 b, n. (5), by Harg.; Litt. s. 132.
(*a*) 2 Bl. Com. 35.

[2. Every tenant for life is answerable for *waste*,—that is, for any spoil or destruction which he does, or allows to be done, to the premises during his tenancy, to the injury of the person entitled to the inheritance in reversion or in remainder (*b*). And there are two kinds of waste,—*voluntary* and *permissive;* the one by the tenant's voluntary act,—as where he pulls down a wall, or cuts down timber (*c*) ; the other by his default, as by suffering a wall to fall down for want of repairs (*d*). But it seems doubtful if the tenant for life of *leaseholds* (whether legal or equitable) is liable for *permissive* waste (*e*) ; the better opinion, however, appears to be that he is liable (*f*), although the testator's estate may also be liable. Estates for life are sometimes limited, however, with a clause expressing that the tenant shall hold the land *without impeachment of waste*,—the effect of which is, that he is not liable for waste of either kind, whether voluntary or permissive ; but even in such a case, a court of equity would interfere to restrain the felling of ornamental timber or other like unwarrantable (and gratuitous) injury to the inheritance,—although such acts might not be legal waste at all, but only waste in equity, *i.e.*, equitable waste (*g*) ;] and now, by the Judicature Act, 1873, an estate for life, without impeachment of waste, confers not on the tenant for life any right to commit waste of the description known as "equitable," unless an intention to confer such right shall expressly appear by the instrument creating the estate (*h*).

(*b*) 2 Bl. Com. 281 ; 3 Bl. Com. 223 ; *Seagram* v. *Knight*, Law Rep. 2 Ch. App. 628.

(*c*) *Honywood* v. *Honywood*, Law Rep., 18 Eq. Ca. 346 ; *Harrison* v. *Harrison*, 28 Ch. Div. 220.

(*d*) *Yellowly* v. *Gower*, 11 Exch. 274 ; *Coles* v. *Courtier*, 34 Ch. Div. 136 ; *Davies* v. *Davies*, 38 Ch. Div. 499 ; *Avis* v. *Newman*, 41 Ch. Div. 432.

(*e*) *In re Baring*, [1893] 1 Ch. 61 ; *In re Tomlinson*, [1898] 1 Ch. 232.

(*f*) *In re Redding*, [1897] 1 Ch. 876 ; *Hickling* v. *Boyer*, 3 Mac. & G. 635 ; *Eccles* v. *Mills*, [1898] A. C. 360.

(*g*) *Herlakenden's Case*, 4 Rep. 63 a ; *Dowman's Case*, 9 Rep. 10 b ; *Pyne* v. *Dor*, 1 T. R. 55.

(*h*) 36 & 37 Vict. c. 66, s. 25, sub-s. (3) ; *Burgess* v. *Lamb*, 16 Ves. 174 ; *Morris* v. *Morris*, 15 Sim. 505.

3. Tenant for life cannot, apart from statute, make leases beyond his own life, or so as to bind those in remainder; but under divers statutes, he may, upon a due compliance with the provisions in that behalf applicable contained in the statutes, not only make leases to endure beyond his own life, but also sell the entire inheritance in fee simple, or other the whole estate which is settled,—both which powers are conferred upon him by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and still more freely by the Settled Land Act, 1882 (45 & 46 Vict. c. 38),—two statutes which, with others *in pari materiâ*, will be hereafter more particularly discussed (*i*).

4. [Tenant for life shall not be prejudiced by the determination of his estate, where such determination is sudden and unforeseen; and therefore, if a tenant for his own life sows the lands, and dies before harvest, his representatives shall have the *emblements*, or profits of the crop so sown,—for the estate was determined by the act of God, and *actus Dei nemini facit injuriam* (*j*); and the emblements are to compensate for the labour and expense of tilling, manuring, and sowing the lands, as well as for the encouragement of husbandry also, which is of public utility. And if a man be tenant for the life of another, and the *cestui que vie*,—that is to say, he during whose life the land is held,—dies after the corn sown and before the harvest, the tenant *pur autre vie* shall have the emblements.] And if a life estate be determined by act of law,—if, *e.g.*, a lease is made to husband and wife during coverture, and the husband sows the land, and afterwards before the harvest there is a divorce, the husband shall have the emblements,—for the sentence of divorce is an act of the law (*k*). [But if a life estate be determined by the tenant's *own act* (as by forfeiture for waste committed, or if tenant during widowhood

(*i*) See bk. II. pt. I. c. XXIV.

(*j*) Co. Litt. 55 a, 55 b; *Cooper* v. *Woolfit*, 2 H. & N. 122.

(*k*) *Oland's Case*, 5 Rep. 116.

[should think proper to marry), in these, and similar cases, the tenants having thus determined the estate *by their own acts*, shall not be entitled to the emblements (*l*). The emblements extend not only to corn sown, but to roots planted, or other annual artificial profit; but not to fruit-trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth (*m*),—for when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The right to emblements was extended to the parochial clergy by the statute 28 Hen. VIII. c. 11, s. 6,—for a parson may be considered as tenant for his own life.]

5. [If a tenant for life under-let, his lessee (*i.e.*, the under-lessee) has, by the common law, the same right of emblements (*n*),—nor will he lose that right, where the tenant for life by his own act determines his life estate; and therefore in the case of a woman who holds *durante viduitate*, although her taking husband is her own act, and therefore deprives her of the emblements, yet if she have leased to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the under-tenant of his emblements (*o*).] And now as regards tenants at a rack-rent—that is, at a rent equal to the full value of their lands—who hold under landlords entitled for life or other uncertain interest, a more ample protection than was afforded by the doctrine of emblements at the common law has been provided by the statute 14 & 15 Vict. c. 25, s. 1 (*p*), by which it has been enacted that where in such cases the lease or other tenancy shall determine by the

(*l*) *Knevett* v. *Pooll*, Cro. Eliz. 461; 1 Roll. Abr. 727.

(*m*) Co. Litt. 55 a, 55 b; 1 Roll. Abr. 728.

(*n*) Co. Litt. 55 b.

(*o*) *Ibid.*

(*p*) *Haines* v. *Welch*, Law Rep., 4 C. P. 91.

death (or by cesser otherwise of the estate) of the landlord, the tenant shall continue to hold until the expiration of the current year of his tenancy; at which time he shall (without being required or entitled to give or to receive any notice) quit upon the terms of his holding, in the same manner as if his tenancy were determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding owner is, in such a case, entitled to recover (as the landlord could have done if his interest had continued) a fair proportion of the rent for the period elapsed from the termination of the landlord's interest to the time of the tenant's quitting; and the succeeding owner and tenant respectively are to be entitled (as against each other) to all the benefits, and are to be subject to all the terms, to which the landlord and tenant respectively would have been entitled or subject, in case the tenancy had determined in manner aforesaid at the expiration of such current year; and these provisions are in lieu of emblements.

[Formerly, and by the common law, where a tenant for life had let, and died during the currency of the lease, his lessees might, if they so pleased, on the deaths of their lessors, have quitted the premises, and paid no rent to anybody for the occupation of the land subsequent to the last quarter-day (*q*); but now, by the 11 Geo. II. c. 19, the executors or administrators of tenant for life, on whose death any demise has determined, may recover of the lessee in such a case a rateable proportion of the rent, from the last day of payment up to the death of the lessor (*r*);] and by the 4 & 5 Will. IV. c. 22, where any demise *in writing* determines by the death either of the lessor or of the life of the *cestui qui vie* (*s*), a proportion of the rent is, in like manner, recoverable from the lessee; and by the Apportionment Act, 1870 (33 & 34 Vict. c. 35),

(*q*) *Clun's Case*, 10 Rep. 127.

(*r*) *Mills* v. *Trumper*, Law Rep., 4 Ch. App. 320.

(*s*) *Lock* v. *De Burgh*, 4 De G. & Sm. 470; *Llewellyn* v. *Rous*, Law Rep., 2 Eq. Ca. 27.

it has been provided generally, and not merely in reference to life tenants and their under-lessees, that all rents, annuities, dividends, and other periodical payments in the nature of income, (whether reserved or made payable under an instrument in writing *or otherwise*,) shall, like interest on money lent, be considered *as accruing from day to day*, and shall (in the absence of an express stipulation to the contrary) be apportionable in respect of time accordingly, and be recoverable by the representatives of the person who would have been entitled to the entire portion, if no such apportionment had taken place (*t*).

[II. Estates for life designated *Legal* life estates, as contradistinguished from the Conventional:—(1) The first of these estates is that of *tenant in tail after the possibility of issue extinct* (*u*), which estate arises, where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue, or (having left issue) that issue becomes extinct,—in either of which cases, the tenant in special tail becomes, for the residue of his life, tenant in tail after possibility of issue extinct (*v*). And the law makes use of this long periphrasis in order to give an adequate idea of his estate; for he has no longer an estate of inheritance,—seeing that he can have no heirs capable of taking *per formam doni* (*x*); nor yet is he *tenant in tail without issue*,—for that would not have excluded the possibility of future issue; and lastly, he is not *tenant in tail without possibility of issue*, but he is *tenant in tail after possibility of issue extinct*,—which phrase not only takes in the possibility of issue in tail which he once had,

(*t*) *Clive* v. *Clive*, Law Rep., 7 Ch. App. 433; *Jones* v. *Ogle*, *ib.*, 8 Ch. App. 192; *Whitehead* v. *Whitehead*, *ib.*, 16 Eq. Ca. 528; *Capron* v. *Capron*, *ib.*, 17 Eq. Ca. 288.

(*u*) Co. Litt. 27 b—28 b; *Lewis Bowles's Case*, 11 Rep. 79 b; *Williams* v. *Williams*, 12 East, 209; 15 Ves. 419; *Platt* v. *Powles*, 2 Mau. & Sel. 65.

(*v*) Litt. s. 32.

(*x*) *Bowles* v. *Berrie*, 1 Rol. Rep. 184; *Lewis Bowles's Case*, 11 Rep. 80.

[but also states that this possibility is now extinguished for ever. And every such estate is created by the act of God, and it cannot be created by any express limitation; and if lands are given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced without issue, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance which was once vested in them (*y*). The estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life; for besides the name of tenant in tail, the tenant is so far in the condition of a tenant in tail properly so called, as to be dispunishable for waste (*z*), and he formerly possessed some other of the privileges of a tenant in tail, connected with branches of the law which have now become extinct (*a*); and on the other hand, his estate has always been considered for practical purposes as equivalent to an estate for life only,—wherefore the law always permitted a tenant in tail of this description, and an ordinary tenant for life, to make mutual alienation of their estates, by that particular method of conveyance called an *exchange*,—a conveyance applicable only in the case of estates that are equal in their nature (*b*).

(2.) Another estate for life of the legal kind, as contra-distinguished from the conventional, is the estate *by the curtesy of England*,—that is to say, the estate which a man has, on the death of his wife, in the lands and tenements of which during the marriage she was seised in fee simple or in fee tail,—and the husband is by law entitled to this estate, provided he has had issue by her born alive during the marriage, and capable of inheriting her estate (*c*); but in gavelkind, the rule is that he shall hold a moiety only, and that only while he lives unmarried, his title, however,

(*y*) Co. Litt. 28 a.

(*z*) Co. Litt. 27 b; *Whitfield* v. *Bewitt*, 2 P. Wms. 240; *Williams* v. *Williams*, 12 East, 209.

(*a*) Co. Litt. *ubi sup.*; *Lewis Bowles's Case*, 11 Rep. 80 a.

(*b*) As to an exchange, *vide post*, bk. II. pt. I. ch. XVII.

(*c*) Co. Litt. 29 a—30 b; *Buckworth* v. *Thirkell*, 3 Bos. & Pul. 652, n.

[in this case attaching whether he has inheritable issue born or not (*d*).

The estate by the curtesy is said, in the Mirrour, to have been introduced by King Henry the First (*e*); and it appears to have obtained also in Normandy, and to have been likewise used among the antient Germans; and the reason for the law investing the husband with this estate, is because when a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is entitled to the profits of the lands, in order to maintain the child; and as soon therefore as any child was born, the father acquired a permanent interest in the lands, becoming thereupon one of the *pares curiæ*, and doing homage to the lord (*f*); and he was tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death of the child; and as tenant by the curtesy he was considered to hold of the next lord of the fee (*g*).

There are four requisites necessary to make a tenancy by the curtesy, namely, marriage, seisin, issue, and death (*h*) :—1. The marriage must be a legal one, and subsisting at the death,—so that if void *ipso facto*, or avoided by a divorce, no estate by the curtesy can in either case be claimed (*i*). 2. The seisin of the wife must be an actual seisin, and not a bare right to possess,—not a seisin *in law*, but a seisin *in deed* (*k*); nor may it be an estate in reversion on a freehold (*l*); but the wife's estate may be either legal

(*d*) Robins. Gavelk. bk. ii. ch. 1.

(*e*) Cap. 1, s. 3.

(*f*) It has been suggested that curtesy (*curialitas*) was the name given to this estate from the attendance by the husband on the lord's court (or *curia*), in the capacity of vassal or tenant in respect of his wife's land; and this suggestion is probably correct,—notwithstanding that the tenant is described in the old pleadings as "*Tenaunt per lei d'Engleterre*" (Year-Book, Trin. 1 Edw. 2); and his estate is sometimes described as the *consuetudo et lex Angliæ* (Litt. 35; Co Litt. by Harg. 33 a, n. (5)).

(*g*) 2 Inst. 301; *Paine's Case*, 8 Rep. 36 (a).

(*h*) Co. Litt. 30 a.

(*i*) *Rennington* v. *Cole*, Noy, 29.

(*k*) Co. Litt. 31 a, 29 a.

(*l*) 2 Bl. Com. 127.

[or equitable (*m*). 3. The issue must be born alive ; and if the child be heard to cry, that is the strongest evidence of its being born alive, but is not the only evidence (*n*). The issue also must be born during the life of the mother,—for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy,—*scil.*, because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while yet in the mother's womb, and the estate being once so vested, shall not afterwards be divested (*o*). The issue must also be such as is capable of inheriting the mother's estate (*p*) ; and if therefore a woman be tenant in tail male, and hath only a daughter born, the husband is not entitled to be tenant by the curtesy,—*scil.*, because such issue female can never inherit the estate in tail male (*q*). The time when the issue was born is immaterial, provided it were during the coverture ; for whether it were born before or after the wife's seisin of the lands, and whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy (*q*). The husband by the birth of the child becomes, as was before observed, tenant by the curtesy *initiate*, and may do many acts to charge the lands (*r*) ; but his estate is not *consummate* till, 4. The death of the wife,—which is the last requisite to make a complete tenant by the curtesy (*s*).]

But as regards the wife's fee simple estates when these are held to the separate use of the wife, she may defeat the husband's curtesy, either by deed or will disposing of the estates (*t*) ; and a mortgage of these fee simple estates would defeat the curtesy *pro tanto*.

(*m*) *Casborne* v. *Scarfe*, 1 Atk. 603.
(*n*) Dyer, 25.
(*o*) Co. Litt. 29 b.
(*p*) Litt. s. 52.
(*q*) Co. Litt. 29 b.
(*r*) Co. Litt. 30 a.
(*s*) *Jones* v. *Davies*, 5 H. & N. 779.
(*t*) *Cooper* v. *Macdonald*, 7 Ch. D. 288 ; *Hope* v. *Hope*, [1892] 2 Ch. 336.

[(3.) A third estate for life of the legal kind, as contra-distinguished from the conventional, is the estate *in dower* ; that is to say, the estate which, by the common law, a woman, on the death of her husband, has, for the term of her natural life, in a portion of his lands and tenements (*u*),—and which portion amounts to the third part in value of such lands and tenements, except where the amount is otherwise determined by particular custom ; *e.g.*, in gavelkind, where she is entitled to a moiety, but subject to remaining chaste and unmarried ; and by other particular customs, she is entitled to claim the whole, or only a quarter (*x*).

Dower is called in Latin *doarium*,—or (by Bracton and our English writers) *dos* ; and some have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures (*y*) ; but it may be that dower is the relic of a Danish custom,—since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals (*z*). And in treating of this estate, we will first consider *who* is a wife to be endowed ; secondly, of *what* she may be endowed ; thirdly, *how* she shall be endowed ; and fourthly, how she may be *barred* or defeated of her dower.]

1. And, first, the dowager must be the actual wife of her deceased husband at the time of his decease ; for if there has been a dissolution of the marriage (or, as it was formerly called, a divorce *a vinculo matrimonii*), she shall not be endowed,—*ubi nullum matrimonium, ibi nulla dos* (*a*) ; but a divorce *a mensâ et thoro* (or, as we should

(*u*) Co. Litt. 30 b—41 a ; *Stoughton* v. *Leigh*, 1 Taunt. 402.

(*x*) Robinson on Gavelkind, bk. ii. ch. 2.

(*y*) Wright's Ten. 192.

(*z*) Mod. Un. Hist. xxxii. 91.

(*a*) Bract. l. 2, ch. 39, s. 4. But a wife did not lose dower merely because the marriage was *voidable* (Co. Litt. 33 a) ; nor by reason of her having been married under the age of twelve, or to a husband

now say, a judicial separation) did not, by our common law, destroy the dower, not even though the divorce was for adultery itself (*b*) ; [and by the statute of Westminster the second (13 Edw. I.) st. 1, c. 34, if a woman voluntarily left her husband, and lived with an adulterer, she lost her dower,—unless her husband was voluntarily reconciled to her (*c*).

Also, by the old common law, the wife of a person attainted could not be endowed,—to the intent, says Staunforde, that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may (*d*) ; and, as Britton says, the wife is presumed as privy to her husband's crime (*e*) ; but the 1 Edw. VI. c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower, and the 5 & 6 Edw. VI. c. 11, s. 13, which revived the severity of the old law, revived it only against the widows of attainted *traitors*, and not the widows of attainted *felons*.

2. Supposing no act to have been done to defeat or abridge her rights, the widow was by law entitled to her dower out of all the lands and tenements of which her husband was seised in fee simple or in fee tail at any time during the coverture, and of which any issue, which she might have had, might by possibility have been heir (*f*). Therefore, if a man seised in fee simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands,—for her issue might by possibility have been heir on the death of the son by the former wife. But, if there be a donee in special tail, who holds the lands to him and the heirs of his body, begotten on Jane his

under the age of fourteen,—provided she was above nine years old at her husband's death.

(*b*) Co. Litt. 33 a, 33 b ; *Sidney* v. *Sidney*, 3 P. Wms. 276.

(*c*) 2 Inst. 435 ; *Woodward* v. *Dowse*, 10 C. B. (N.S.) 722.

(*d*) P. C. b. 3, ch. 33.

(*e*) C. 110.

(*f*) Litt. ss. 36, 53. However, the right to dower did not attach to a castle built for the defence of the realm, or to a common without stint (see Co. Litt. 316 ; *Gerard* v. *Gerard*, 3 Lev. 401.)

[wife,—here, though Jane may be endowed of these lands, yet if Jane dies, and the donee marries a second wife, that second wife shall never be endowed out of the lands—for no issue that *she* could have could by any possibility inherit them (*g*). A seisin in law of the husband was as effectual as a seisin in deed, in order to render the wife dowable (*h*),—it not being in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with the wife's title (*i*) ; and she may also now claim dower out of an estate of inheritance in possession, of which her husband was merely the *equitable* owner (*k*), —assuming always that nothing has been done to bar or to defeat her right.

3. As regards the *manner* in which a woman is to be endowed,—formerly, a woman was sometimes endowed by act of the party ; as was the case in (1) Dower *ad ostium ecclesiæ* (*l*),—which was where tenant in fee simple of full age, openly at the church door, after affiance made, endowed his wife with the whole, or such quantity as he pleased, of his lands, at the same time specifying and ascertaining the same ; and in such a case, the wife might, after her husband's death, enter without further ceremony. And the same was the case in (2) Dower *ex assensu patris*,— which was only a species of dower *ad ostium ecclesiæ*, made when the husband's father was alive, and the son, by his consent expressly given, endowed his wife with parcel of his father's lands (*m*).] But both these descriptions of dower have been abolished by the Dower Act, 1834 (3 & 4 Will. IV. c. 105) ; and we need only therefore concern ourselves with dower *by the common law* or *by particular custom* (*n*).

(*g*) Litt. s. 53.
(*h*) 3 & 4 Will. 4, c. 105, s. 3.
(*i*) Co. Litt. 31 a.
(*k*) 3 & 4 Will. 4, c. 105, s. 2.
(*l*) Litt. s. 39.
(*m*) Litt. s. 40.
(*n*) Dower *de la plus belle* was a consequence of the military tenures, and was abolished with them. (2 Bl. Com. p. 132; Co. Litt. 38 a.)

[By the old common law, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence,—lest she should contract herself to the lord's enemy (*o*); and lords would sometimes force the dowager to a second marriage, in order to gain the fine,—until it was provided by *Magna Charta*, that the widow should not be distrained to marry afresh, if she chose to live without a husband (*p*). And it was further provided by that Act, that nothing should be taken for the assignment of the widow's dower; and that she should remain in her husband's capital mansion-house for forty days after his death, during which time, called her *quarantine*, her dower was to be assigned to her; and in an assignment of dower, it was required that the particular lands should be assigned by the heir, or by his guardian (*q*),—not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden; for the heir by his entry became tenant to the lord, and the widow became immediate tenant to the heir by a kind of subinfeudation completed by the assignment (*r*). If the heir or his guardian did not assign the widow her dower within the term of quarantine, or if they assigned it unfairly, the widow had her remedy by action of dower, and the sheriff was directed to assign it (*s*); and on the other hand, if the guardian assigned too much, the heir had his remedy, by *writ of admeasurement*, to recover the excess (*t*). If the thing of which she was endowed was divisible, her dower must have been set out by metes and bounds; but if it was indivisible, she must have been endowed specially,—as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, or the like (*u*).

(*o*) Mir. ch. 1, s. 3.
(*p*) Cap. 7.
(*q*) Co. Litt. 34 b, 35 a.
(*r*) Gilb. Ten. 173.
(*s*) Co. Litt. 34 b, 35 a.
(*t*) F. N. B. 148; Finch, L. 314; stat. Westm. 2, 13 Edw. 1, c. 7.
(*u*) Co. Litt. 32 a.

[4. How dower may be *barred*, or otherwise defeated:—A widow may be barred of her dower by her elopement and adultery, or by her divorce, or by the treason of her husband, as before mentioned ; and she will also be barred if she wrongfully detain the title-deeds of the estate from the heir,—that is, she will be barred until she restores them (*x*). She will also be barred of her right to dower, by a jointure settled on her at the time of her marriage,—a jointure being a joint estate limited to both husband and wife (*y*), as "a competent livelihood of freehold for the " wife, to take effect presently, in possession upon the " decease of the husband, and to endure for the life of " the wife at least" (*z*) ; it being expressly provided by the 27 Hen. VIII. c. 10, commonly called the Statute of Uses, that, upon the husband's making or procuring to be made such an estate in jointure to the wife before marriage she shall be for ever precluded from her dower (*a*),—provided these four requisites have been observed.—1. The jointure must have been limited to take effect immediately on the death of the husband ; 2. It must have been for the wife's own life at the least, and not for any smaller estate ; 3. It must have been made to herself, and to no other in trust for her ; and 4. It must have been made, and must have appeared by the deed to be made, in satisfaction of her whole dower, and not of any particular part of it (*b*). On the other hand, if the jointure was made to her *after* marriage, she had her election after her husband's death, to either accept it, or (refusing it) to betake herself to her dower at common law,—for she was not capable of consenting to it during the coverture. Also if, by any fraud or accident, a jointure made before marriage, proved to be on a bad title, and the jointress was evicted, then, by

(*x*) *Anne Bedingfield's Case*, 9 Rep. 15 b.

(*y*) *Vernon's Case*, 4 Rep. 3 b ; *Earl of Buckinghamshire* v. *Drury*, 3 Bro. P. C. 492.

(*z*) Co. Litt. 36 b ; *Cresswell* v. *Byron*, 3 Bro. C. C. 362.

(*a*) *Vernon's Case*, 4 Rep. 1. 2.

(*b*) *Tinney* v. *Tinney*, 3 Atk. 3.

[the express provisions of the same statute, she was to have her dower at the common law,—*scil.*, to the extent of the eviction (*c*).

There were those two advantages attending jointures,—namely : (1) The widow might (unlike the dowress) enter at once, without any formal process, on her jointure land (*d*) ; and (2) The title to lands settled in jointure (unlike the title to dower) remained unimpeached by the treason of the husband, or by the elopement and adultery of the wife (*e*).

Independently of the bar of dower by way of jointure, if the husband made any provision for his wife by will or otherwise, in such a manner as clearly to indicate an intention that the provision so made should be taken in lieu of dower, she was barred by her acceptance, after his death, of the provision so made, being allowed an option or election to accept it or not (*f*).

Dower would also be barred if the husband, on his original purchase, took the conveyance of the land in the form of *to uses to bar dower* (*g*),—which conveyance (the exact nature of which will be hereafter expounded) was a contrivance founded on the Statute of Uses, and which, while it gave the husband a clear dominion over the property, yet did not give him precisely such an estate as by the rules of law entitled his widow to her dower. But if the husband had neglected to take a conveyance in that form, the wife's right (up to a late period) could not have been defeated by any alienation or device which her husband might afterwards have thought fit to resort ; and her release of dower by means of a *fine* was therefore necessary to a valid conveyance of such lands by the husband (*h*).] Which necessity operated as a clog on

(*c*) *Beard* v. *Nuthall*, 1 Vern. 428.

(*d*) Co. Litt. 36 b.

(*e*) *Sidney* v. *Sidney*, 2 P. Wms. 277.

(*f*) Co. Litt. by Harg. 36 b, n. 1 ; 3 & 4 Will. 4, c. 105, ss. 9, 10.

(*g*) Butler's Fearne, 346—349 9th ed.

(*h*) *Vide infra*, c. XIX.

the transfer of property; and eventually therefore, when by the great increase in modern times of personal property, the husband could make ample provision otherwise for his wife, no sufficient reason remained for continuing the inconvenient restraint; and by the Dower Act (3 & 4 Will. IV. c. 105),—which is applicable to all women married after the 1st January, 1834,—it has accordingly been provided, that all dispositions by the husband of his land (whether absolute or partial, and whether by conveyance in his lifetime, or by will), and all debts and incumbrances of his to which his land may be subject, shall be valid and effectual as against the widow's right to dower (*i*); and the Act also provides, that a simple declaration in purported bar of the wife's dower, if introduced into the deed by which the land is originally conveyed to the husband, or into any deed executed by him, or into his last will and testament, shall be sufficient to defeat the dower; and the Act further provides, that where the husband devises for his wife's benefit any part of his land that is subject to dower, she shall be thereby barred of her dower unless a contrary intention is declared by the will (*k*); but a bequest of personalty, or a devise of land on which her claim would not attach, would not in such a case operate as a bar of dower (*l*).

[The wife's dower seems at first to have extended to a *moiety* of the husband's lands, and to have been determinable on re-marriage; then by the charter of Henry the First, the condition of widowhood was only required in case the husband left any issue; and afterwards the condition was lost sight of altogether. Under Henry the Second, dower *ad ostium ecclesiæ* was the most usual species of dower (*m*); but in those days of feudal vigour, the husband was not allowed to endow his widow *ad ostium*

(*i*) *Lacey* v. *Hill*, Law Rep., 19 Eq. Ca. 346.

(*k*) *In re Thomas, Thomas* v. *Howell*, 34 Ch. Div. 166.

(*l*) *Chalmers* v. *Storil*, 2 Ves. & Bea. 244; *Dickson* v. *Robinson*, Jacob. 503.

(*m*) Glan. l, 6, cc. 1 and 2.

[*ecclesiæ* with more than the third part of the lands whereof he then was seised (though he might endow her with less),—for by a too liberal endowment the lord might have been defrauded of his wardships and other feudal profits (*n*) ; and if no dower *ad ostium ecclesiæ* was made to the wife, then she was endowed by the common law of the third part (*dos rationabilis*) of such lands and tenements as the husband was seised of at the time of the espousals, and no other,—unless he especially engaged before the priest to endow her of his future acquisitions ; and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower in land which he might afterwards acquire (*o*). In King John's Magna Charta, and the first charter of Henry the Third (in the year 1216), no mention is made of any alteration of the common law, in respect of the lands subject to dower ; but in the charters of 1217 and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime,—though in case of a specific endowment of less, *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death ; and this continued to be the law during the reigns of Henry the Third and Edward the First (*p*). In Henry the Fourth's time it was denied to be law, that a woman should be endowed of her husband's goods and chattels (*q*): and, under Edward the Fourth, Littleton lays it down

(*n*) Bract. l. 2, ch. 39, s. 6.

(*o*) When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, used to declare with what specific lands he meant to endow his wife ; but when the wife was endowed generally, the husband merely said, "with all my lands and tenements I thee endow"; and when he endowed her with personalty only, he used to say, "with all my wordly goods, (or, as the Salisbury ritual has it, *with all my worldly chattel*,) I thee endow," — which words entitled the wife to her thirds, or *pars rationabilis* of her husband's personal estate, as provided for by Magna Charta, c. 26.

(*p*) Bract. *ubi sup.* ; Britton, cc. 101, 102 ; Flet. l. 5, ch. 23, ss. 11, 12.

(*q*) P. 7 Hen. 4, 13, 14.

[expressly, that a woman might be endowed *ad ostium ecclesiæ* with *more* than a third part (*r*) ; and should have election, after her husband's death, to accept such dower, or to refuse it and betake herself to her dower at the common law (*s*)].

(*r*) Litt. s. 39 ; F. N. B. 150. (*s*) Litt. s. 1.

CHAPTER V.

OF ESTATES LESS THAN FREEHOLD.

HAVING now investigated the nature of freehold estates, we arrive at the consideration of those which are less than freehold, and which are otherwise called *chattels real* (*t*). The appellation "*chattels*" was originally derived from the technical Latin word "*catalla*," which, among the Normans, primarily signified only beasts of husbandry, but, in a secondary sense, was applicable to moveables in general, and indeed to whatever was not a *fief* or *feud* (*u*); and the English law adopts the term, considering as a chattel whatever amounts not to a freehold. Any estate in lands and tenements, which amounts not to freehold, is consequently a chattel; but inasmuch as it concerns, or *savours* of, the realty (*x*), it is denominated a chattel *real*, to distinguish it from things which do not concern, or savour of the realty, and which are described as chattels *personal* (*y*).

Chattels, whether real or personal, receive the common denomination of *personal* estate, to distinguish them from estates of freehold, which are denominated *real* estate (*z*); and as regards the incidents distinguishing the two denominations, though "livery of seisin" was a ceremony without which no estate of freehold could pass at the common law, it was no more requisite to the transfer of a chattel real, than to the transfer of a chattel personal; also, a chattel real belongs, on the death of the owner, to his executor or administrator, like a chattel personal, and

(*t*) Co. Litt. 118 b.
(*u*) 2 Bl. Com. 386.
(*x*) Co. Litt. 118 b.
(*y*) 2 Bl. Com. p. 387.
(*z*) 2 Bl. Com. 386.

does not descend, like a freehold of inheritance descends (or used to descend), to his heir; also the interest in a chattel real, as in a chattel personal, may be made to commence *in futuro*, which was not allowed, at common law, as to the freehold in a corporeal hereditament; also, the tenant of a chattel real is not said to be *seised*, like the tenant of a freehold, but to be *possessed* only, as if it were a chattel personal; moreover, there can be no estate tail in a chattel real, any more than in a chattel personal, but only in a freehold (*a*).

Of estates that are less than freehold, there are three sorts: I. Estates for years; II. Estates at will; and III. Estates by sufferance.

I. An Estate for years:—This estate is where a man has an interest in lands and tenements, and a possession thereof by virtue of such interest, for some fixed and determinate period of time (*b*); as in the case where lands are let for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon (*c*); and this amounts but to a chattel real, however long the period of time for which the lands are demised,—for, in contemplation of law, no interest for a certain and determinate period of time,—even for 1,000 years,—is as large as an estate for life, which, as we have seen, is the lowest description of freehold (*d*).

[Though the lease be but for half a year, or for a quarter year, or even for but a month or a day, the lessee is for some purposes reputed a tenant for years (*e*). And concerning the division and calculation of time by the English law, it is proper here to observe, that a *year* is a determinate period, consisting of 365 days, the extra day in leap-years being (by the 40 Hen. III.) accounted part of the preceding day, so that the two days make but one day

(*a*) 2 Bl. Com. p. 398.
(*b*) Co. Litt. 43 b—54 b.
(*c*) Litt. s. 58.
(*d*) Co. Litt. 46 a.
(*e*) Litt. s. 67.

[in law. And a *month* is either a *lunar* month (consisting of twenty-eight days) or a *calendar* month whereof in a year there are twelve ;] and by the old common law, a month used to be, in matters temporal, a lunar month, and in matters ecclesiastical, a calendar month (*f*),—unless where custom or the obvious meaning of the parties made it reasonable to depart from the usual construction of the term month (*g*) ; also, in all statutes, a month means, and has long meant, a calendar month (*h*) ; also, in the Orders and Rules of 1883 of the Supreme Court of Judicature, and generally in all judgments and orders made by the Court, the word month denotes a calendar month (*i*). [The old rule, however, continues to apply to a lease ; and consequently, a lease for "twelve months" is only for forty-eight weeks,—and a lease for six months is not a lease for half a year (*k*) ; but where the lease is for "a twelvemonth," it will be good for the whole year (*l*).] As regards the legal significance of a *day*, all the twenty-four hours are usually reckoned therein (*m*), so that, if, *e.g.*, I am bound to pay money on any certain day, I discharge the obligation (as a general rule) if I pay the money any time before twelve o'clock at night (*n*). Also, and with a view to convenience, the law considers the ordinary periods of time without regard to their fractional parts (*o*),—half a year consists of 182 days, and a quarter of a year of 91,—the remaining hours being in either case rejected (*p*) ; also, the fractions of a day

(*f*) *Lacon* v. *Hooper*, 6 T. R. 226 ; *Simpson* v. *Margetson*, 11 Q. B. 23.

(*g*) *Davy* v. *Salter*, 3 Salk. 346 ; *Hipwell* v. *Knight*, 1 Y. & Col. 401.

(*h*) 52 & 53 Vict. c. 63, s. 3, repealing but re-enacting 13 & 14 Vict. c. 21.

(*i*) Order LXIV. r. 1.

(*k*) *Wilkinson* v. *Calvert*, 3 C. P. D. 360 ; *Barlow* v. *Teal*, 15 Q. B. D. 403.

(*l*) *Catesby's Case*, 6 Rep. 62 a.

(*m*) Co. Litt. 135 a ; *Duppa* v. *Mayo*, 1 Saund. 287.

(*n*) 43 & 44 Vict. c. 9 (Greenwich time).

(*o*) *Wright* v. *Mills*, 4 H. & N. 488.

(*p*) Co. Litt. 135 b ; *Bishop of Peterborough* v. *Catesby*, Cro. Jac. 167 ; Yelv. 100 ; Dy. 345 a.

will not usually be regarded,—except when justice requires it, as, *e.g.*, for the purpose of determining the priorities of successive mortgagees, or of deeds registered in the Middlesex and Yorkshire Registries, the difference of an hour or of a minute often requiring in such cases to be regarded (*q*). But to return to estates for years.

[Estates for years were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money or provisions (*i.e.*, rent) to their landlords ; and in order to encourage them in the cultivation of the ground, they had a permanent interest granted them, not determinable at the will of the lord ; and yet their possession or title was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, than as having any property of their own in the lands (*r*). And therefore they were not allowed to have a freehold estate ; but their interest, such as it was, vested after their deaths in their representatives, —who were to make up the accounts of the deceased with the landlord and the other creditors, and were entitled to the stock upon the farm.

So long as estates for years were thus precarious, it is no wonder that they were usually short ; and indeed, by the antient law, no leases for more than forty years were allowable,—because any longer possession, especially when given without any livery declaring the nature and duration of the estate, tended to defeat the inheritance (*s*) ; but the law was soon altered in that particular ; and in Madox's collection of antient instruments, some early leases for years are found which considerably exceed the term of 40 years (*t*) ; and long terms—for three hundred years or a

(*q*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 5 (2), E. ; and see *Tomlinson* v. *Bullock*, 4 Q. B. D. 230 ; and *Clarke* v. *Bradlaugh*, 7 Q. B. D. 151 ; 8 Q. B. D. 63.

(*r*) Bac. Ab. Leases.

(*s*) Mirrour, c. 2, s. 27 ; Co. Litt. 46 b ; 45 a.

(*t*) Madox, Formulare Anglican. No. 239, fol. 140 ; *ibid.* No. 245, fol. 146 ; *ibid.* No. 248, fol. 148, &c.

[thousand—were certainly in use in the time of Edward the Third (*u*), and probably of Edward the First (*x*). At all events, when by the stat. 21 Hen. VIII. c. 15, the lessee, otherwise called the termor, was protected against fictitious recoveries, and his interest (which might formerly have been defeated thereby) (*y*), was rendered more secure and permanent, long terms began to be more frequent than before, and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages (*z*).

Every estate (by whatever words created) which expires at a period certain and prefixed, is an estate for years,—whence this estate is frequently called a term (*terminus*), because its duration or continuance is limited and determined, and every such estate must have a certain beginning and a certain end (*a*) ; but according to the maxim, *id certum est, quod certum reddi potest*, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years, when J. S. hath named the years (*b*). Also, if in the writing whereby the term (or lease) is created, no day for the commencement of the term is expressly specified, the law will seek to find (by construction of the writing itself) some day for the commencement (*c*) ; and if the lease be by deed, the day for the commencement is (or usually is) in such a case, the day of the date of the making and delivery of the lease (*d*). But if the certainty of the term cannot be ascertained, the lease will be void ; and a lease for so many years as J. S. shall live, or for so many years as he shall continue parson of Dale, is void from the beginning, being neither certain nor (during the continuance of the lease) reduceable to a

(*u*) 32 Ass. pl. 6 ; Bro. Abr. t. Mordauncestor, 42 ; Spoliation, 6.

(*x*) Stat. of Mortmain, 7 Edw. 1.

(*y*) Co. Litt. 46 a ; 2 Just. 321 ; Cro. Eliz. 28 a ; 718.

(*z*) *Ascough's Case*, 9 Rep. 135 ; *Brediman's Case*, 6 Rep. 57.

(*a*) Co. Litt. 45 b.

(*b*) *Bishop of Bath's Case*, 6 Rep. 35 b.

(*c*) *Re Lander and Bayley's Contract*, [1892] 3 Ch. 41.

(*d*) Co. Litt. 46 b ; *Doe* v. *Benjamin*, 9 Ad. & El. 644.

[certainty (*e*) ; but a lease for twenty or more years, if J. S. shall so long live, or shall so long continue parson of Dale, is good,—for there is a certain period fixed, beyond which it cannot last though it may determine sooner, on the death of J. S. or his ceasing to be parson of Dale (*f*).

The word *term*, when applied to an estate for years, signifies the estate itself which the grant confers, and not merely the period of time specified in the grant ; and therefore the term (*scil.*, the estate) may determine during the continuance of the time,—as by surrender, forfeiture, and the like ; for which reason, if I grant a lease to A. for a term of three years, and "*after the expiration of the said term*" to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect ; but if the remainder be to B. "after the expiration of the said three years," B.'s interest will not commence till the three years have fully elapsed, whatever may become of A.'s term (*g*)].

An estate for years not being created by livery of seisin, the tenant is not said to be *seised*, but to be *possessed* thereof ; also, for the creation of this estate, it is not proper to limit it to a man and his "heirs," but to a man and his "executors and administrators"; and indeed it is sufficient if it be granted to a man himself only, without mention of his personal representatives,—for in these, on his death, the law will vest it without any special words of limitation.

Again, this estate, as it required no livery of seisin, so at common law, it might be constituted for whatever length of duration by mere agreement, verbal or written, if followed up by the entry of the lessee,—until the Statute of Frauds (29 Car. II. c. 3), whereby it was enacted, that no lease for more than three years, or at a lower rent than two-thirds of the improved value of the thing demised, should be effectual, unless put into writing and signed by

(*e*) Co. Litt. 45 b.
(*f*) *Ibid.*
(*g*) *Ibid.*

the party demising or his agent thereunto lawfully authorized by writing (*h*) ; and by 8 & 9 Vict. c. 106, s. 3, a lease theretofore required to be in writing (if made after the 1st of October, 1845) was rendered void at law unless made *by deed* ; and that is still the law, although, under the Settled Land Act, 1890 (*i*), and in accordance with the provisions of that Act, a tenant for life may, by writing under hand only, make any lease for a term not exceeding three years,—but in such a case the rent will, in general, be the full rent.

A bare demise by the common law, as contradistinguished from a bargain and sale under the Statute of Uses, does not of itself vest the estate for years in the lessee, but gives him only a right of entry on the tenement,—which right is called his "interest in the term," or *interesse termini* ; and when he has actually so entered, the estate is then, and not before, completely vested in him ; but the *interesse termini* is so far in the nature of an estate, that even before entry the lessee may grant over his interest to another, although he may not, before entry, maintain an action of trespass for an injury to the land (*k*).

[Tenant for term of years hath incident to and inseparable from his estate the same estovers as a tenant for life ; that is to say, house-bote, fire-bote, plough-bote, hay-bote (*l*), and the like ; and the doctrine of *waste*, also, applies to tenants for years, equally as to tenants for lives.] And with regard to emblements, where the term depends upon a certainty, as if the tenant holds from Midsummer for ten years, and in the last year he sows a crop of corn, which is not ripe and cut before Midsummer, then, by the common law, the landlord shall have it,—in the absence of any special contract or custom to the contrary ; and this is because the tenant knew the date appointed for the expiration of his term, and therefore it was his own

(*h*) 29 Car. 2, c. 3, ss. 1, 2 ; *Lord Bolton* v. *Tomlin*, 5 Ad. & El. 856.
(*i*) 53 & 54 Vict. c. 69, s. 7 (iii.).
(*k*) 2 Bl. Com. 144 ; Plowd. 198.
(*l*) Co. Litt. 41 b.

folly to sow that of which he never could reap the profits (*m*). But where the lease for years depends upon an uncertainty, as upon the death of the lessor,—being himself only tenant for life, or being a husband seised in right of his wife ; or if the term of years be determinable upon a life or lives,—in these and similar cases, the estate for years not being to expire certainly at a time foreknown, but by the act of God,—the tenant for years, or his representatives, shall have the emblements in the same manner that a tenant for life, or his representatives, are entitled thereto (*n*). But it is otherwise, if the term determine by the act of the party himself ; as if he does anything that amounts to a forfeiture,—in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default (*o*). The right to emblements by the common law is, however, now much more limited than it once was, having ceased (as we have seen), by the effect of the 14 & 15 Vict. c. 25, to apply to such tenants as hold at a rack rent under a landlord entitled for life or for any other uncertain interest, and whose lease or tenancy determines by the death of their landlord, or by the cesser of his estate ; and a protection of a different kind—that is to say, a continuing of their holding till the end of the current year—being now provided for tenants so circumstanced.

A tenancy "from year to year," or "by the year," may be created, in the first place, by the express agreement of the parties,—which agreement (provided the rent reserved be at the least two-thirds of the annual value of the land demised) may be either verbal or in writing,—although if the rent is under that amount, then it must be *by deed*. Secondly, such a tenancy may arise by construction of law ; for if a man demises premises to another at a yearly rent, no length of time being expressed, the law will

(*m*) 2 Bl. Com. p. 145 ; Litt. s. 68.

(*n*) 2 Bl. Com. p. 145.

(*o*) Co. Litt. 55 b.

construe this as a demise from year to year (*p*); and the law will always imply a tenancy from year to year where there is an occupation at an annual rent, and there is no evidence that the occupier's estate is of a different description (*q*). And if a man was let into possession under a demise not under seal, for a term of more than three years, though such a demise would not pass any legal interest in the premises for the term specified, yet the lessee was considered as holding from year to year, upon such of the terms of the agreement as were consistent with that tenancy (*r*); but, at the present day, such a demise (being good in equity as an agreement to demise) confers an equitable interest in the land for the whole term, and not merely a legal interest from year to year (*s*).

It is to be observed, that where a tenancy "by the year" or "from year to year" is once created, it cannot, on either side, be put an end to without half a year's *notice to quit* from the one party to the other, such notice expiring with the current year of the tenancy (*t*); though if the tenancy commenced at one of the usual quarterly feast days, the half year may be computed from one of such feast days to another—as from Midsummer to Christmas—whether there be 182 days between them or not (*u*); and it follows, therefore, that a lease "from year to year" will necessarily confer an estate for one year certain, at the outset (*x*); and if in that or any succeeding year of the tenancy, more than half a year should elapse without a notice to quit being given by either of the parties, another year certain is thereby constantly added to that which is

(*p*) *Richardson* v. *Langridge*, 4 Taunt. 128; *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*q*) *Doe* d. *Lord* v. *Crago*, 6 C. B. 90.

(*r*) *Tress* v. *Savage*, 4 Ell. & Bl. 36, 42.

(*s*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 20 Q. B. D. 585; 21 Q. B. D. 289.

(*t*) *Doe* v. *Smith*, 5 Ad. & El. 351; *Doe* v. *Stanion*, 1 Mee. & Wels. 691.

(*u*) *Doe* v. *Watkins*, 7 East, 551; *Roe* v. *Doe*, 6 Bing. 574.

(*x*) *Doe* d. *Cornwall* v. *Matthews* 11 C. B. 675.

in progress (*y*). Also, and upon the same principle, if the lease be "*for a year*, and so from year to year," it will enure as a demise for *two years* certain, at the outset,—for at the expiration of the first year, there is a continuation of the tenancy, which cannot be determined by a notice to quit at an earlier period than the expiration of the second year (*z*). Moreover, this estate does not determine by an assignment of the interest of either of the parties, or by their death ; but the tenancy will continue to exist between one of the parties and the assigns or representatives of the other,—or between the assigns or representatives of both parties (as the case may be),—until duly determined by the usual notice to quit (*a*) ; and as regards leases which fall within the provisions of the Agricultural Holdings Act, 1883 (*b*), a *year's* notice, expiring with the current year of the tenancy, is now made necessary in lieu of the old half-year's notice. And when the tenancy is for a less period than a year,—say, from month to month, or from week to week, it may, in general, be determined by a month's notice (if it be a monthly letting), and by a week's notice (if it be a weekly letting) (*c*). Lastly, it is to be observed, that a tenant for years, where the demise comprises a house, is bound to keep the house in weather-tight condition, and consequently will be answerable for such permissive waste as may arise by his neglect to do so (*d*).

II. An Estate at will :—This is where lands and tenements are let by one man to another to have and to

(*y*) *Stapylton* v. *Clough*, 2 Ell. & Bl. 983 ; *Hogg* v. *Brooks*, 15 Q. B. D. 256.

(*z*) *Denn* v. *Cartwright*, 4 East, 32.

(*a*) *Doe* v. *Porter*, 3 T. R. 13 ; *Buckworth* v. *Simpson*, 5 Tyr. 354.

(*b*) 46 & 47 Vict. c. 61, s. 33 ; *Wilkinson* v. *Calvert*, 3 C. P. D. 360 ; *Barlow* v. *Teal*, 15 Q. B. D. 403.

(*c*) *Jones* v. *Mills*, 10 C. B. (N.S.) 800 ; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

(*d*) *Yellowly* v. *Gower*, 11 Exch. 274 ; *Davies* v. *Davies*, 38 Ch. Div. 499 ; *Avis* v. *Newman*, 41 Ch. D. 432.

hold at the will of the lessor, and the tenant by force of the lease obtains possession (*e*) ; and such an estate may be constituted by written or verbal agreement without further ceremony, if followed by entry ; and, in some cases, it arises by mere construction of law.

[Tenant at will hath no certain indefeasible estate,—nothing that can be assigned by him to any other,—*scil.*, because the lessor may determine his will, and put him out whenever he pleases. And every estate at will is at the will of both landlord and tenant,—so that either of them may determine the will, and quit his connexion with the other, at his own pleasure (*f*). Yet this must be understood with some restriction ; for, if the tenant at will sows his land, and the landlord, before the corn is ripe or before it is reaped, puts him out, in such a case, the tenant shall have the emblements, with free ingress, egress, and regress to cut and carry them away (*g*) ; *secus*, where the tenant himself determines the will (*h*).]

The liability of a tenant at will, in regard to voluntary waste, is similar to that of tenant for years (*i*) ; but he is not liable for permissive waste (*k*).

[A tenancy at will may be determined, not only by express notice of the intention to determine it, but also by any act on the part of the landlord which is inconsistent with the estate continuing (*l*),—as, for example, by his entering upon the land and cutting timber, or carrying away stone (*m*), or taking a distress for rent and impounding it on the premises (*n*) ; or by any similar inconsistent act on the part of the tenant,—as, for example, by his committing waste (*o*), or assigning his estate ; and

(*e*) Litt. s. 68 ; Co. Litt. 55 a—57 b.

(*f*) Co. Litt. 55 a—57b.

(*g*) *Ibid.* 56 a.

(*h*) *Ibid.* 55 b.

(*i*) *Ibid.* 57.

(*k*) *Harnett* v. *Maitland*, 16 Mee. & W. 257.

(*l*) Co. Litt. 57 ; *Henchman* v. *Iles*, 1 Ventr. 248.

(*m*) *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643.

(*n*) Co. Litt. 57 b.

(*o*) *Ibid*, 57 a.

[if either the lessor or the lessee die or be outlawed, the will is at an end (*p*).

But a sudden determination of the will by one party, shall not prejudice of the other,—and the lessee, after the determination of the lessor's will, shall therefore have reasonable ingress and egress to fetch away his goods and utensils (*q*) ; and if the rent be made payable quarterly or half-yearly, and the lessee determines the will, the lessor shall, in such a case, be entitled to be paid the rent to the end of the current quarter or half-year (*r*) ; but, in fact, the courts lean against construing demises, where no certain term is mentioned, as tenancies at will (*s*), and rather hold them to be *tenancies from year to year, so long as both parties please.*]

III. An Estate at sufferance :—This is where one comes into possession under a lawful demise, and, after such demise is ended, nevertheless continues the possession (*t*). [As if a man takes a lease for a year, and (after the year is expired) continues to hold the premises, without any fresh lease from the owner of the estate ; or, if a man maketh a lease at will, and die, and the lessee continueth in the possession, he is tenant at sufferance (*u*). But no man can be tenant at sufferance under the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by the law ; but the king's tenant, so holding over, is considered as an absolute intruder (*x*).

The estate (or tenancy) at sufferance may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant, doing so peaceably ; but, before entry, he cannot maintain an action of trespass against him, as he might against a stranger (*y*) ; and the

(*p*) *Oland's Case,* 5 Rep. 116 b ; Co. Litt. 57 b, 62 b.

(*q*) Litt. s. 69.

(*r*) *Leighton* v. *Theed,* 2 Salk. 414 ; *Kighly* v. *Bulkly,* 1 Sid. 339.

(*s*) *Doe* v. *Cox,* 11 Q. B. 122.

(*t*) Co. Litt. 57 b, 271 a ; 2 Inst. 134.

(*u*) Co. Litt. 57 b.

(*x*) Co. Litt. *ubi sup.*

(*y*) *Trevellian* v. *Andrew,* 5 Mod. 384.

[reason is, because the tenant being once in by a lawful title, the law, (which presumes no wrong in any man,) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act—such as entry—will declare the continuance to be tortious, or, in common language, wrongful.]

No fealty is due from either a tenant at will or a tenant at sufferance, neither of them having "any sure estate" (*z*), and the tenant at sufferance not having in fact any estate at all (*a*).

And it will be convenient in this place to consider (or to consider more specifically) certain chattels of a mixed real and personal character, namely, (1) Emblements, (2) Fixtures, (3) Title-deeds, (4) Heirlooms, (5) Animals *feræ naturæ*, and (6) Shares.

(1.) *Emblements* are the growing crops annually produced by the labour of the cultivator. All natural growths, until they are actually severed from the soil, are, of course, in legal contemplation, parcel of the realty not less than the soil itself; but upon severance, they change their character, and are converted into personalty (*b*),—consequently, when in the first predicament, they are governed by all those rules, as to estate and title, which are incident to things real; but when in the second predicament, they are governed by the rules which attach to things personal:—For example, trees, while still implanted in the ground, are parcel of the freehold, and as such will pass, on the death of the fee simple owner thereof, to his heir or devisee; but when felled or blown down, they become part of his personal estate, and belong on his decease to his executor or administrator. To this general doctrine, however, emblements or *fructus industriales*, are an exception,—for these, while still in union with the soil, follow in

(*z*) Co. Litt. 93 a, 93 b; *Denn* v. *Fernside*, 1 Wils. 176.

(*a*) Co. Litt. 270 b.

(*a*) *In re Ainslie*, *Swinburn* v. *Ainslie*, 28 Ch. Div. 89; 30 Ch. Div. 485.

several particulars, the nature of personal, as distinguished from real estate.

And, in the first place, emblements may be lawfully severed from the soil, and removed by the tenant whose cultivation has produced them, though his interest in the land may be too limited to entitle him to cut down trees or the like ; thus, a tenant, whose estate comes to an end at a period which he was not in a condition to foresee, is entitled to cut and carry away, when ripe, even after his tenancy has determined, the emblements which he has sown or planted ; and, again, upon the death of a terretenant seised in fee, the emblements on his land growing at the time of his decease will devolve, by this rule of law, upon his executor, or, in case of his intestacy, on his administrator,—and will not descend to his heir ; and for this the reason seems to be, that they were sown with the intention of being reaped by himself, and of being thus ultimately converted into, so as to form portion of, his personal estate ; but the *devise* to a man of a particular piece of land, will (unlike a descent) suffice to carry also with it to the devisee the emblements growing thereon at the testator's death (*c*).

Again, the emblements of a terretenant are subject, like his moveables, to be distrained upon for any arrears of rent that he may owe to his landlord. Formerly, indeed, this was otherwise ; for, at common law, it was the moveables only of the tenant that were liable to distress ; and the emblements were considered, for this purpose, as parcel of the freehold itself, and to be consequently exempt (*d*) ; but now, by the 11 Geo. II. c. 19, landlords are permitted to distrain corn, grass, hops, or other produce of a similar nature, growing on the demised premises (*e*). And in case of a judgment against the terretenant, his emblements are liable to be taken upon a writ of *fieri facias*,—a rule

(*c*) *Anon.*, Cro. Eliz., 61 ; Co. Litt. by Hargrave, 55 b.

(*d*) 1 Roll. Abr. 666 ; *ib.* pl. 4 ; 3 Bl. Com. 9, 10 ; Co. Litt. by Harg. 47 b, n. (1).

(*e*) *Clark* v. *Calvert*, 8 Taunt. 742.

founded on the similarity which exists, in other particulars, between emblements and personal property, and more particularly on the circumstance of their devolving on the personal representative, and not on the heir (*f*)

Emblements, it should be mentioned, comprise not only corn of all kinds, but other annual products of the labour of the cultivator, such as hops, hemp, flax, saffron, melons, cucumbers, turnips, and carrots (*g*) ; but do not comprise fruit growing on trees, or the natural grasses (*h*).

(2.) *Fixtures* may be defined as things of an accessory character, annexed to houses or lands ; and they include not only such matters as grates in a house, or steam-engines in a colliery (which follow in some respects the law of personal chattels), but such things also as windows and palings, which are for every purpose parcel of the realty. To be a fixture, however, the thing must not constitute a part of the principal subject-matter itself,—*e.g.*, the walls or floors of a house, being an intrinsic part of the house, are never described as fixtures : and yet the fixture must be in some union or connection (actual or constructive) with the principal subject-matter, and not merely brought into contact with it, as in the case of a picture suspended on hooks against a wall, or a wooden barn resting, by its weight alone, upon a brick foundation (*i*).

By an antient rule of the common law (the result, perhaps, of that paramount regard which in former times was paid to land as compared with personal property), every fixture, or thing annexed to the realty, became, immediately on the annexation, part of the realty itself,—the maxim being *quicquid plantatur solo, solo cedit* (*k*) ;

(*f*) Gilb. Exec. 19; *Poole's Case*, 1 Salk. 368 ; *Peacock* v. *Purvis*, 2 Brod. & Bing. 368.

(*g*) Co. Litt. 55 b ; Toller, Exec. 193.

(*h*) 2 Bl. Com. 123 ; Toller, *ubi supra*.

(*i*) *Elwes* v. *Maw*, 3 East, 55.

(*k*) *Lee* v. *Risdon*, 7 Taunt. 191 ; *Swinburn* v. *Ainslie*, 30 Ch. Div. 485.

and the application of this maxim implied that, in general, the fixture was thereafter governed by the same law which applied to the land with which it was incorporated, and that it ceased altogether to follow the law applicable to personal estate (*l*). There are, however, numerous cases in which the contrary is now true, and in which the fixture now retains, after its annexation, the quality of a personal chattel,—these cases forming, in truth, the exceptions which have been gradually introduced in the course of judicial decision, reason and convenience seeming to require that, with regard to them, the old common law rule should be qualified (*m*). And, accordingly, we find the law to be :—

First, as between a tenant in fee's heir (or devisee) and his personal representatives, the fixtures will in general follow the land ; even such of them as have been put up merely for ornament or domestic use, devolving to the real representative, inasmuch as they are not capable of removal without material damage to the freehold, and are essential to its enjoyment, if not in its natural, at least in its acquired or factitious, character (*n*) ; and the same rule seems to apply also (*scilicet*, as between these parties) to such fixtures as have been placed or erected for purposes connected with trade (*o*).

Secondly, as between the tenant of a particular estate and the person entitled in remainder, though in general the former is bound to commit no *waste*, but to keep the inheritance entire and unimpaired ; yet it would seem that trade fixtures, and also ornamental or domestic fixtures, if put up by himself, may be lawfully removed by him, or by his personal representative, as the case may be,—and

(*l*) *Horn* v. *Baker*, 9 East, 215 ; *Sheen* v. *Rickie*, 5 Mee. & W. 175.

(*m*) *Buckland* v. *Butterfield*, 2 Brod. & Bing. 54.

(*n*) 2 Bl. Com. 428 ; *D'Eyncourt* v. *Gregory*, Law. Rep., 3 Eq. 382; *Norton* v. *Dashwood*, [1896] 2 Ch. 497 ; *Viscount Hill* v. *Bullock*, [1897] 2 Ch. 482.

(*o*) Toller, Ex. 198 ; *Elliott* v. *Bishop*, 10 Exch. 496 ; *Fisher* v. *Dixon*, 12 Cl. & Fin. 312.

that either during the continuance of his estate, or on its determination.

Thirdly, as between mortgagors and mortgagees, the old common law rule for a long time asserted its predominance,—and even trade fixtures were in general esteemed parcel of the realty, whether expressly mentioned or not (*p*); and it is difficult to say, that the old rule is not still applicable in this particular, although in the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31 and 45 & 46 Vict. c. 43), requiring registration of a mortgage of personal chattels, they are undoubtedly treated as being (for the purposes of registration) mere personal chattels (*q*). But where, after the mortgage, the mortgagor leases to another, and the lessee erects trade fixtures on the land demised, his (the lessee's) right to remove these fixtures is not lost by reason of the mortgage, and the mortgagee cannot therefore sell such fixtures as if they were (by force of the old common law rule) comprised in his security (*r*); also, in general, chattels bought by the mortgagor, and brought upon and affixed to the mortgaged land subsequently to the mortgage,—will not pass to the mortgagee, if the seller reserve his property therein until the price therefor is paid (*s*),—*scil.*, because, in these two particulars, the exigencies of modern business clearly demanded a modification of the general law.

Fourthly, as between landlord and tenant, it is held that the latter, though guilty in general of waste if he despoils the freehold, may nevertheless take away during the continuance of his term—though not (unless by permission) after he has quitted the premises (*t*)—such fixtures as he

(*p*) *Climie* v. *Wood*, Law Rep., 3 Ex. 257; 4 Exch. 328; *Longbottom* v. *Berry*, *ib.* 5 Q. B. 123.

(*q*) *Topham* v. *Greenside Firebrick Co.*, 37 Ch. D. 281; *Batcheldor* v. *Yates*, 38 Ch. Div. 112.

(*r*) *Sanders* v. *Davis*, 15 Q. B. D. 218.

(*s*) *Cumberland Bank* v. *Maryport Iron Co.*, [1892] 1 Ch. 415; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182.

(*t*) *Heap* v. *Barton*, 12 C. B. 274; *Leader* v. *Homewood*, 5 C. B. (N.S.) 546.

has himself put up, either for the purposes of trade, or for the ornament or furniture of the premises demised (*u*); and of course, the legal representative of the tenant (including his trustee in bankruptcy) has the like right of removal (*x*). But this right does not extend to erections of such a nature, that their removal would be of material detriment to the freehold,—for these latter fall under the general rule, and not under the exception, and must consequently be yielded up to the landlord, at the end of the term, as parcel of the inheritance (*y*). Nor did this right extend, at common law, to things annexed to the realty for purposes merely *agricultural*; but, by the 14 & 15 Vict. c. 25, s. 3, if a tenant of a farm or lands (with the consent in writing of his landlord), at his own expense, erects any building or machinery, either for agricultural or trade purposes (being under no previous obligation to do so), such erection remains the property of (and is removable by) the tenant, though, in removing it, he is not to injure the premises demised; and the landlord may (on receiving notice) elect to purchase the fixture, at a value to be ascertained by two referees or their umpire. Also, more recently, by the Agricultural Holdings Act, 1883 (*z*), re-enacting a similar provision contained in the Agricultural Holdings Act, 1875 (*a*), it has been enacted generally, and not merely as regards the holdings principally affected by that Act, that where after the commencement of the Act (*scil.*, after the 31st day of December, 1883), a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not (under the Act or otherwise) entitled to compensation,—and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or

(*u*) *Wilde* v. *Waters*, 16 C. B. 687; *Elliott* v. *Bishop*, 11 Exch. 113.

(*x*) *In re Walker*, 13 Q. B. D. 454; *In re Moser*, *ib.* 738.

(*y*) *Buckland* v. *Butterfield*, 2 Brod. & Bing. 54.

(*z*) 46 & 47 Vict. c. 61, s. 34.

(*a*) 38 & 39 Vict. c. 92, s. 53.

building belonging to the landlord,—then such fixture or building shall be the property of, and be removable by, the tenant before, or within a reasonable time after, the termination of the tenancy, subject nevertheless to these provisions, namely :—(1) Before the removal of the fixture or building, the tenant is to pay all rent, and to satisfy all other his covenants in respect of the holding ; and (2) In the removal, he is not to do any avoidable damage to the holding ; and (3) Immediately after the removal, he is to make good all the damage occasioned to the holding by the removal ; also (4) The tenant is not to remove the fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it ; whereupon (5) At any time before the expiration of the notice, the landlord, by counter-notice in writing given by him to the tenant, may elect to purchase the fixture, and thereupon it is to be left by the tenant, and becomes the property of the landlord, he duly paying therefor the price thereof, as agreed between them or (failing such agreement) as ascertained by valuation.

And here we may conveniently observe, that, in extension of what theretofore was in many cases expressly contracted for, or by custom impliedly agreed upon, between the landlords and tenants of agricultural land, there is by the same Act (namely, the Agricultural Holdings Act, 1883, repeating and extending the Agricultural Holdings Act, 1875) provided, in favour of such tenants, a species of *tenant-right* (or right to compensation for what are called unexhausted improvements),—and which compensation is primarily payable by the landlord (and not by the incoming tenant) (*b*) ; and the provisions which on this head are contained in the Act may be briefly stated as follows, it being first premised that any agreement which purports to exclude the Act is void (*c*) : And firstly the Act applies, as the name of the Act partly denotes,

(*b*) *Bradburn* v. *Foley*, 3 C. P. D. 129; *Mansell* v. *Norton*, 22 Ch. D. 769.

(*c*) Sect. 55.

only to cases of an agricultural character, that is to say, to a holding which is either wholly agricultural or wholly pastoral, or partly the one and partly the other (*d*), market-gardens being now specially provided for by the 58 & 59 Vict. c. 27 (*e*): And secondly, the Act enables the tenant to claim from his landlord, on the determination of the tenancy, compensation in respect of any improvement which he (the tenant) has executed on his holding,—being an improvement which comes within any or either of the three classes specified in the first schedule to the Act (*f*),—which compensation (unless the amount thereof is agreed upon between them) is to be settled and ascertained by arbitration according to certain rules laid down in the Act (*g*), and which rules are intended to supply the basis upon which the arbitrators shall estimate the amount of the compensation payable,—an appeal being allowed to the county court from the decision of the arbitrators or of their umpire, and (in a matter of law) from the county court to the High Court (*h*),—the Act nevertheless expressly providing, that the tenant (claiming compensation under the Act) shall not be entitled to compensation also under any custom of the country, or under any contract in respect of the same subject-matter,—but otherwise the tenant is to remain entitled to such last-mentioned compensation (*i*): and, in respect of improvements executed within (in effect) one year of the determination of his tenancy, the Act limits the claim to compensation to manures only (*k*). And somewhat similar provisions for compensation are also (we may observe) contained in the 50 & 51 Vict. c. 26, as regards cottage gardens, and allotments not exceeding two acres (*l*),—these last-mentioned provisions being in substitution for the like provisions contained in the Agricultural Holdings Act, 1883.

(*d*) Sect. 54.
(*e*) *King* v. *Eversfield*, [1897] 2 Q. B. 475.
(*f*) Sect. 1.
(*g*) Sects. 6—22.
(*h*) Sect. 23.
(*i*) Sect. 57.
(*k*) Sect. 59.
(*l*) *Cooper* v. *Pearse*, [1896] 1 Q. B. 562.

Fifthly, with regard to the rights of the execution creditor and of the landlord to seize and sell fixtures,—the creditor on a writ of *fieri facias*, and the landlord on a distress,—the rule appears to be, that, upon a *fieri facias* issued against the tenant for years, who is entitled to remove them, the fixtures may be seized and sold under such writ (*m*),—but upon the like writ issued against the tenant of the freehold, they are exempt from the operation of any such process (*n*) ; and fixtures are not ordinarily subject to a distress for rent (*o*),—at least in cases where they cannot (on payment of the rent) be restored, after removal, in the like plight and condition (*p*).

(3.) *Title-deeds*, including charters, court-rolls, and other evidences of the title to lands, together with the chests in which they are contained, pass together with the inheritance, and go not to the executor (*q*) ; and the reason is, because such documents are necessary to the well-being of the inheritance, and so (by the general law) pass with it, and as parcel of the freehold ; and their custody is with the legal freeholder, although he should be only entitled to the lands for his life (*r*). But where title-deeds have been deposited by the owner as a security for money lent, they are chattels in the hands of the mortgagee, and his special property in them will pass, on *his* decease, to his personal representative (*s*).

Moreover, the coat armour of a man's ancestor, hung up in a church with the pennons and other ensigns of honour suited to his degree, pass with the inheritance (*t*) ; and

(*m*) *Poole's Case*, Salk. 368.

(*n*) Gilb. Execution, 19 ; *Winn* v. *Ingilby*, 5 Barn. & Ald. 625.

(*o*) Co. Litt. 47 b. ; *Gorton* v. *Falkner*, 4 T. R. 565.

(*p*) *Darby* v. *Harris*, 1 C. B. 895 ; *Hellawell* v. *Eastwood*, 6 Exch. 295.

(*q*) Bro. Ab. tit. Chattels, 18 ; Co. Litt. 6 a ; Com. Dig. Biens, B. ; Charters, A. ; *Wright* v. *Robotham*, 33 Ch. D. 106.

(*r*) *Allwood* v. *Heywood*, 1 H. & C. 745 ; *Leathes* v. *Leathes*, 5 Ch. D. 231.

(*s*) Shep. Touch. 469.

(*t*) *Spooner* v. *Brewster*, 3 Bing. 136.

the case is the same with regard to a monument or tombstone,—for all these are fixtures of a peculiar kind ; and, contrary to the common rule, they do not combine with the subject real to which they are visibly attached, that is to say, with the churchyard or with the church-fabric, which is the freehold of the parson ; and accordingly, albeit the chattels in question are annexed to that freehold, yet neither the parson nor the personal representative of the ancestor can take them away, or in any way deface them ; but each is liable, for any such removal or defacement, to an action, at the suit of the heir of the ancestor (*u*).

(4.) *Heir-looms* are such personal chattels as, by the *special custom* of a particular place, pass upon death together with the inheritance of the messuage or land with the occupation of which they are connected,—the termination *loom* being of Saxon original, in which language it signified a limb or member, so that an heir-loom is nothing else but a limb or member of the inheritance (*x*) ; and under the denomination of heir-looms, even carriages, pictures, utensils, and other household implements, may be included (*y*),—provided the custom to so include them be strictly proved (*z*) ; and the antient jewels of the crown are also said to be heir-looms (*a*) ; and all such vest in and descend upon the heir, or other the person entitled to the inheritance for a freehold estate therein, whereas all chattels personal whatsoever (other than those of this peculiar character) vest in the personal representatives of the deceased owner (*b*). Also, it is said, that heir-looms, though mere chattels, cannot be devised away from the inheritance by will,—such a devise being void, even when made by the tenant in fee simple ; the owner might, it is true, during his life, have sold or disposed of

(*u*) 12 Rep. 105 ; Co. Litt. 18 b.

(*x*) 2 Bl. Com. 427 ; Co. Litt. 18 b ; Termes de la Ley ; Spelm. Gloss. 277 ; 14 Vin. Ab. 291.

(*y*) *Corven's Case*, 12 Rep. 105 ; *Francis* v. *Ley*, Cro. Jac. 366.

(*z*) 2 Bl. Com. 428 ; Co. Litt. 18, 185.

(*a*) Co. Litt. 18.

(*b*) Co. Litt. 388.

them, as he might of the timber on his estate,—since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet they being at his death instantly vested in the heir, the devise of them (which is subsequent, and not to take effect till after his death) is postponed to the custom, whereby they have already descended (*c*).

The term "heir-looms" is, however, often applied, in ordinary speech, in a much wider sense, and so as to include, for example, pictures, plate, furniture, and the like, directed by will or settlement to follow the limitations, thereby made, of some family mansion or estate; but the word is not then employed in its strict and proper sense; nor is the disposition itself, beyond a certain point, effectual; for the articles will, in such a case, belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate; and the person so becoming entitled to them may clearly dispose of them by his will; and if he die intestate, they will pass to his personal representative, and not to his heir (*d*).

(5.) Animals *ferœ naturæ* are ranked as parcel of the freehold, by the *general law* of the realm, because they are necessary to the well-being of the inheritance (*e*); and when they are confined upon a man's estate but not domesticated, they pass, if he were seised of an estate of inheritance, to his heir or devisee; and if he was possessed for a term of years, they pass to his executor or administrator (*f*); but if domesticated, they become goods and chattels, equally with animals naturally tame,—in which latter case, they belong, in every instance, on the death of the owner, to his personal representative (*g*).

(*c*) 2 Bl. Com. 429; Co. Litt. 185 b; Woodd. Vin. Lect. vol. ii. p. 380.

(*d*) *Gower* v. *Grosvenor*, Barnard. Ch. Rep. 54; Co. Litt. by Harg. 18 b, n. (7).

(*e*) 2 Bl. Com. 427.

(*f*) Co. Litt. 8 a; Wentworth's Off. Ex. 35; *Lidford's Case*, 11 Rep. 50; *Morgan* v. *Abergavenny*, 6 C. B. 768; *Bain* v. *Brand*, 1 App. Ca. 762.

(*g*) Wentworth's Off. Ex. 154; and see Bk. ii. Pt. ii. ch. 1, of this treatise.

(6.) *Shares* in public undertakings connected with land: —The property in the lands of a company,—such as mines, canals, and railroads,—to which the public subscribe and which are vested in such subscribers as a body corporate, is in the nature of real estate, so far as regards the lands themselves and the right of using such lands, and so far also as regards the fixtures connected with the undertaking (*h*). But the *shares* of the individual corporators in the undertaking,—that is to say, the right which each individual possesses as a partner or quasi-partner in the company, or as a participator in the surplus profits derived from the employment of the company's capital, are in the nature of personal estate (*i*),—and are usually, by the divers statutes relating to the company, expressly declared to be personal estate, for all the purposes of transmission and also for other general purposes (*k*).

(*h*) *Stoughton* v. *Leigh*, 1 Taunt. 402; *Minshall* v. *Lloyd*, 2 Mee. & W. 450.

(*i*) *Bligh* v. *Brent*, 2 Yo. & C 268.

(*k*) 25 & 26 Vict. c. 89, s. 22.

CHAPTER VI.

OF ESTATES UPON CONDITION.

[ESTATES *upon condition* (*a*) or (as they are otherwise called) conditional estates, have been reserved till now, because they are indeed more properly qualifications of estates, than a distinct species of themselves,—*scil.*, because any quantity of interest—a fee, a freehold, or a term of years—may depend upon condition ; and the condition is either (1) implied by law, or (2) expressed in the grant itself.

(1.) Estates upon Condition *Implied* :—These are where a grant of an estate has a condition annexed to it by the law, and which from its essence and constitution is inseparably so annexed, although no condition be expressed in words. As if a grant be made to a man of an "office" generally, without adding other words, the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office (*b*) ; and on breach of that implied condition, it is lawful for the grantor, or his heirs, to oust the grantee, and to grant the office to another person (*c*).

"Franchises," also, or regal privileges in the hands of a subject, are held to be granted on the same implied condition of making a proper use of them ; and therefore, like offices, they may be forfeited either by abuse or by neglect (*d*) ; and the same principle underlies in fact all

(*a*) Co. Litt. 201 a—237 a ; *Lord Stafford's Case*, 8 Rep. 73 b.

(*b*) Litt. s. 378 ; *Bartlett* v. *Downes*, 3 Barn. & Cress. 619.

(*c*) Litt. s. 317.

(*d*) *Earl of Shrewsbury's Case*, 9 Rep. 50.

[those forfeitures of estates which result (or arise) from acts done by the tenant incompatible with his estate,—*e.g.*, if a tenant for life or for years enfeoffs a stranger in fee simple, that *by the common law*, was a forfeiture of his estate, being a breach of the condition which the law annexed thereto, viz. that he should not attempt to create a greater estate than he himself was entitled to.]

(2.) Estates upon Condition *Expressed* :—These are where an estate is granted—either in fee simple or otherwise — with an expressed qualification or condition annexed (*e*), whereby the estate granted shall either commence (*f*), be enlarged (*g*), or be defeated (*h*), upon performance or breach of such qualification or condition ; and these conditions (commonly called conditions in *deed*) are either "precedent," that is, such as must happen or be performed before the estate can vest or be enlarged ; or "subsequent," that is, such as by the failure or non-performance of which, an estate ready vested may be defeated. [Thus, if a man grant to his lessee for a term of years, that upon payment of a hundred marks within the term he shall have the fee, this is a condition precedent, and the fee simply passeth not till the hundred marks be paid (*i*) ; but if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent, and it is provided, that, if rent be not paid at the times appointed in the reservation, it shall be lawful for the grantor and his heirs to re-enter and avoid the estate, in such a case, the grantee and his heirs have an estate upon condition subsequent,—an estate defeasible, if the condition be not performed (*k*).]

Besides these estates on condition subsequent, there are also estates created by way of *conditional limitation* (*l*),—

(*e*) Co. Litt. 201 a.
(*f*) Co. Litt. 216 a—218 b.
(*g*) *Lord Stafford's Case*, 8 Rep. 11 ; Fearne, by Butler, 279, 9th ed.
(*h*) Co. Litt. 214 b, 215 a.
(*i*) Co. Litt. 217 b ; *Lord Stafford's Case*, 8 Rep. 73 b.
(*k*) Litt. s. 325.
(*l*) Co. Litt. 234 b ; *Mary Portington's Case*, 10 Rep. 40 b, 41 b.

and in which, the estate is so expressly defined and limited in and by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is limited. To this class may be referred all base fees, and fees simple conditional at the common law: [For example, an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate in fee on condition that he and his heirs continue tenants of that manor; also, a personal annuity granted to a man and the heirs of his body, being no tenement within the statute of Westminster the second, is and remains a fee simple on condition that the grantee has heirs of his body; and upon the same principle depend, in fact, all the determinable estates of freehold already mentioned, as estates *durante viduitate* and the like.

There is some resemblance, no doubt, between conditional limitations and estates depending on conditions subsequent; but the difference between them is great; for in the case of a conditional limitation, (as when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like,) the estate determines as soon as the contingency happens, and the estate in remainder, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy; whereas, in the case of an estate upon *condition in deed* (as if an estate be granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.,) the law permits the estate to endure beyond the time of the contingency happening, unless the grantor or his heirs takes advantage of the breach of the condition, and makes an entry in order to avoid the estate (*m*)]. As to the necessity of entry, however, in such a case, there is a

(*m*) Litt. s. 327, 331; 32 Hen. 8, c. 34; *Brooke* v. *Spony*, 15 Mee. & W. 153.

diversity (says Lord Coke) between a condition annexed to a freehold estate and a condition annexed to a lease for years (*n*) ; for if a lease for years be made on condition that if the lessee goes not to Rome before such a day the lease shall be void, the lease is *ipso facto* void upon the breach of the condition, without any entry by the lessor ; but if the lease is for life, an entry is necessary to defeat it (*o*),

The right of entry on breach of a condition subsequent could not, at the common law, be reserved in favour of a stranger, but only in favour of the grantor and his heirs ; and the effect of an entry by him or them, after breach, was to defeat altogether the estate which had before passed to the grantee,—so that the grantor or his heirs were *in* again as of their former seisin (*p*). It was also a rule of the common law, that the right of entry on *breach* could not be assigned in any case to a stranger (*q*),—so that if a man had made a lease for life, reserving a rent, with a proviso for re-entry in case of non-payment, and the lessor granted over his reversionary estate to another, the grantee could take no benefit from the condition (*r*). But, by the 32 Hen. VIII. c. 35 (*s*), the law in this respect was altered, and the grantee of the reversion upon a lease for life or years, now has, in respect of any breach subsequent to the grant to him, the same benefit from the condition of re-entry as the grantor himself would have had ; but, for this purpose, the condition for breach of which he is proceeding must relate to the payment of rent, the restriction from waste, or other like object tending to the benefit of the reversionary interest (*t*) ; and by the 22 & 23 Vict. c. 35, s. 3, where the reversion on a

(*n*) *Roberts* v. *Davey*, 4 Barn. & Adol. 664 ; *Hill* v. *Kempshall*, 7 C. B. 975.

(*o*) Co. Litt. 214 b ; *Doe* v. *Pritchard*, 5 Barn & Adol. 765.

(*p*) Fearne, by Butler, 381, n. (a), 9th ed. ; *Davis* v. *Eyton*, 7 Bing. 154.

(*q*) Litt. s. 347.

(*r*) Co. Litt. 215 a.

(*s*) *Thursby* v. *Plant*, 1 Saund. by Wms. 237 ; *Wright* v. *Burroughes*, 3 C. B. 685.

(*t*) Co. Litt. 205 b.

lease is *severed* (*i.e.*, split up between two or more individual purchasers, grantees of the reversion), and the rent is legally apportioned, each grantee of the reversion is, *quoad* such portion of the demised lands as is included in his purchase, entitled to the full benefit of the condition or right of re-entry created by the original lease,—*scil.*, for non-payment of the rent apportioned to the lands included in his purchase. Also, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), ss. 10—12, upon any such severance of the reversion upon a lease created after the 31st December, 1881, the condition of re-entry (and every other condition) is annexed to and goes along with every part of the severed reversion (s. 10); and the lessor's covenants binding on the original reversion are annexed to and go with (and are binding on) every part of the severed reversion (s. 11); and the condition of re-entry and every other condition in the lease are apportioned (s. 12), —and the old law, whereby a condition of re-entry was one and indivisible, and if discharged in part was discharged in whole (*u*), appears to be now wholly abrogated.

[Express conditions annexed to estates are void,—firstly, if they be *impossible* at the time of their creation, or afterwards by the act of God or of the grantor, become impossible; and secondly, if they *be contrary to law*, or *repugnant* to the estate granted. In any of which cases, if they be conditions *subsequent*, the estate shall be absolute at once, and the condition subsequent discharged; if, *e.g.*, a feoffment be made to a man in fee simple, on condition to be void,—unless he goes to Rome in an hour, or marries with Jane S. by such a day (within which time the feoffor marries her himself); or unless he kills another, or in case he alienes in fee,—in all these cases, the condition is void, and the estate is at once made absolute in the feoffee (*x*). But if the condition be *precedent*

(*u*) Brooke's Abr., Conditions, 193; *Dumpor's Case*, 4 Rep. 119.

(*x*) Co. Litt. 206 a; *Clifford* v. *Watts*, Law Rep., 5 C. P. 577; *Rosher* v. *Rosher*, 26 Ch. Div. 801; *Kelly* v. *Elliott*, [1896] 2 Ch. 353.

[or to be performed before the estate vests, as a grant to a man that if he kills another or goes to Rome in an hour, he shall have an estate in fee ; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant,—for he hath no estate until the condition be performed (*y*).]

A condition, valid in itself, may be waived by the grantor or person entitled to the benefit of it (*z*) ; and as the law always leans against forfeitures (*a*), it will consider that the grantor has waived his right to enter for breach of a condition subsequent, if, after notice of the breach committed, he does any act inconsistent with an intention to avail himself of the forfeiture. Thus, if a lease be made with a proviso that, in the event of the lessee's assigning his interest, the lessor shall be at liberty to enter on the land demised as of his former estate,—he will nevertheless not be entitled to enter, if, after an assignment made, he accepts rent from the assignee (*b*) ; but under the 23 & 24 Vict. c. 38, s. 6, an actual waiver of the benefit of any covenant or condition in a lease is not to be deemed to extend to any breach other than that to which the waiver specially relates, and is not to operate as a general waiver of the covenant or condition in question (*c*) ; and, of course, there can be no waiver of a continuing breach (*d*) ; but, in the latter case, the covenant or condition may be released altogether.

Regarding estates upon condition, more particular notice must be taken of the three following varieties of them,

(*y*) Co. Litt. 206 a ; *Shrewsbury* v. *Scott*, 6 C. B. (N.S.) 179.

(*z*) Co. Litt. 218 a.

(*a*) *Ibid.* 206 b ; *Clay* v. *Bowler*, 5 Ad. & El. 403 n.

(*b*) Co. Litt. 211 b ; *Doe* v. *Lewis*, 5 Ad. & El. 277 ; *Hartshorne* v. *Watson*, 4 Bing. N. C. 178.

(*c*) 15 & 16 Vict. c. 76, s. 210 ; 22 & 23 Vict. c. 35, ss. 1—3, 4—9 ; 23 & 24 Vict. c. 126, ss. 1, 2 ; 44 & 45 Vict. c. 41, s. 14 ; 55 & 56 Vict. c. 13, ss. 2, 4.

(*d*) *Penton* v. *Barnett*, [1898] 1 Q. B. 276.

namely, mortgage estates, estates by statute merchant and statute staple, and estates by elegit.

And, firstly, as to Mortgage Estates:—These were anciently of two kinds, being either *vivum vadium* or *mortuum vadium*.

[*Vivum vadium* was when a man borrowed a sum (say 200*l.*) of another, and granted him an estate (as of 20*l. per annum*) to hold till the rents and profits should repay the sum so borrowed,—that is to say, an estate conditioned to be void, as soon as such sum was raised; and in this case, the land or pledge was said to be living,—for it subsisted and survived the debt,—and in a sense worked off the debt; and immediately on the discharge of the debt, the land resulted back to the borrower (*e*). *Mortuum vadium* was where a man borrowed of another a sum and granted him an estate in fee (or for a less interest), on condition that if the mortgagor should repay the mortgagee the said sum on a certain day mentioned in the deed, that then the mortgagor might re-enter on the estate so granted; and inasmuch as the mortgagee received and took the rents and benefits *without account*,—the security did not of itself discharge itself, but was (in a manner) dead; also the land was by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor, and thereupon the mortgagee's estate in the lands was no longer conditional, but absolute; but so long as the estate continued conditional, that is, between the time of lending the money and the time appointed for re-payment, the mortgagee was called tenant in mortgage (*f*).]

The modern form of mortgage is, as the name itself denotes, more like the *mortuum vadium* than the *vivum vadium*; but the mortgagee is *subject to account*. And under the modern mortgage (meaning a legal mortgage by

(*e*) Co. Litt. 205 a; *Fenwick* v. *Reed*, 1 Meriv. 119; *Flory* v. *Denny*, 7 Exch. 581.

(*f*) Litt. s. 332.

conveyance subject to redemption), so soon as the estate in mortgage is created, the mortgagee (in the absence of any stipulation to the contrary) may enter on the lands, being, however, bound to restore them upon payment of the mortgage money on the day limited; and therefore it is usual to insert in the mortgage deed a proviso, that the mortgagor shall hold the land till default on the day assigned for payment, on which default happening, if not sooner, the mortgagee is entitled to enter and take possession,—nor do the principles of *law* admit of his being afterwards evicted by the mortgagor (*g*); and on this entry by the mortgagee, if there is a tenant in possession, under a lease *prior* to the mortgage, his possession cannot of course be disturbed, but he pays over his rents to the mortgagee; and if there be a tenant in possession under a lease granted by the mortgagor *subsequently* to the mortgage, and without the privity of the mortgagee, he may be ejected without notice,—unless indeed such subsequent lease was made under and in conformity with the Conveyancing Act, 1881 (*h*); but, in either case, he is now entitled, on the determination of his tenancy, to the like right against the mortgagee which he had against the mortgagor for compensation for his tenant right (if any) (*i*).

But, though a mortgage be thus forfeited on such default, and the estate thereupon becomes absolutely vested at law in the mortgagee, yet in equity the mortgagor will be allowed to recall, *i.e.*, *redeem*, his estate, on paying to the mortgagee his principal, interest, and expenses,—for otherwise, an estate worth 1,000*l.* might, in strictness of law, be forfeited for non-payment of 100*l.* or a less sum; and six months' notice must, in general, be given of the mortgagor's intention to redeem, or else six months' interest must, in general, be paid in lieu of giving such

(*g*) *Doe* v. *Maisey*, 8 Barn. & Cress. 767; *Partington* v. *Woodcock*, 6 Ad. & El. 695; *Russell* v. *Russell*, 1 Bro. C. C. 269.

(*h*) 44 & 45 Vict. c. 41, s. 18.

(*i*) 53 & 54 Vict. c. 57.

notice (*k*). But under the 37 & 38 Vict. c. 57, a mortgagor is not entitled to redeem but within *twelve* (formerly twenty) *years* next after the time that the mortgagee takes possession,—unless indeed an acknowledgment in writing shall in the meantime have been given by the mortgagee of the right of the mortgagor, in which latter case the period of twelve years commences to run anew from such acknowledgment; and conversely, a mortgagee who has not taken possession, may only make an entry or bring an action to recover the possession within twelve (formerly twenty) years next after the last payment of any part of the principal or interest secured by the mortgage (*l*); but he may do this, although more than twelve years have elapsed since his right under the mortgage-deed to enter shall have first accrued,—provided he shall, in the latter case, have commenced before the expiration of such twelve years an action against the mortgagor for foreclosure of his equity of redemption (*m*), a proceeding to be presently explained.

The estate of the mortgagor, after default, is called his *equity of redemption*; and while his equity of redemption continues, the *mortgagor* is regarded in equity as the owner of the estate, subject only to the mortgage debt (*n*); and on his death the mortgaged estate comes to his devisee (or heir) encumbered with the debt; and before "Locke King's Acts" (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; and 40 & 41 Vict. c. 34), the estate so encumbered and devised or descending was in general entitled to be discharged of the debt, at the expense of the *personal* estate of the deceased mortgagor (*o*); but these acts have now altered the law in that particular.

(*k*) *Shrapnell* v. *Blake*, 2 Eq. Ca. Ab. 34; *Fitzgerald's Trustee* v. *Mellersh*, [1892] 1 Ch. 385.

(*l*) 7 Will. 4, and 1 Vict. c. 28; 37 & 38 Vict. c. 57.

(*m*) *Doe* d. *Palmer* v. *Eyre*, 17 Q. B. 366; *Pugh* v. *Heath*, 7 App. Ca. 235.

(*n*) *Casborn* v. *Scarfe*, 2 Eq. Ca. Abr. 728.

(*o*) *Brownson* v. *Lawrance* Law Rep., 6 Eq. Ca. 1; *Nelson* v. *Page*, *ibid.*, 7 Eq. Ca. 25; *Sackville* v. *Smyth*, *ibid.*, 17 Eq. Ca 153.

The mortgagor desiring to discharge the mortgage debt may take proceedings "to redeem" in a court of equity (*p*); and if the mortgagee be not in possession, this proceeding merely calls upon the mortgagee to reconvey on payment of principal, interest, and costs; but if the mortgagee has obtained possession, it asks that an account may be taken of all the rents and profits on the one hand, and of the principal, interest, and costs on the other, and a balance struck between them; and that, on payment of what may appear due on such account (*i.e.*, of the balance), a reconveyance may be made, and the possession of the premises restored (*q*). By the 37 & 38 Vict. c. 78, s. 4, the legal *personal representative* of the mortgagee (being the person entitled to receive the mortgage moneys) might, on payment of the moneys secured by the mortgage, have reconveyed the mortgaged estate; but that section of this Act was repealed by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 30), which last-mentioned Act has enacted that such personal representative *shall* (not merely *may*) in such a case reconvey the estate, and that whether the mortgagee die testate or intestate.

On his part also, the mortgagee, where his debt remains unpaid for more than a reasonable time after the time agreed on, may (although the time for redeeming in equity be still running) take proceedings "for foreclosure," calling upon the mortgagor to redeem his estate presently, or in default thereof to be for ever *foreclosed* from redeeming the same,—that is, to lose his equity of redemption without possibility of recall (*r*); and in such proceedings, the Court may direct a sale of the property (*s*). And in some cases of fraudulent mortgages (*t*), such as twice mortgaging the same lands without giving notice of the

(*p*) *Scotto* v. *Heritage*, Law Rep. 3 Eq. Ca. 212.

(*q*) *Parkinson* v. *Hanbury*, Law Rep., 2 H. of L. Ca. 1.

(*r*) *Campbell* v. *Holyland*, 7 Ch. D. 166.

(*s*) 15 & 16 Vict. c. 86, s. 48; *Newman* v. *Selfe*, 33 Beav. 522; 44 & 45 Vict. c. 41, s. 25.

(*t*) 4 & 5 W. & M. c. 16.

mortgage already effected, the fraudulent mortgagor may be summarily deprived of his equity of redemption, *i.e.*, may be declared to have forfeited his estate altogether. Where there are successive mortgages on estates, each mortgagee, ignorant of the other incumbrances, the maxim *qui prior est tempore, potior est jure*, in general prevails, where all the mortgages are equitable (*u*) ; but preference is given, in the general case, to the mortgagee in possession of the legal estate (*x*). The mortgagee may also bring the estate to sale in satisfaction of his debt, (paying over the surplus proceeds, if any, to the mortgagor,) even without resorting to proceedings in equity, and without any concurrence on the part of the mortgagor (*y*),—provided the security be taken in such form as to authorize that course of proceeding, and which is usually a deed ; and even if no power of sale be conferred by the express terms of the deed, the mortgagee may still bring the estate to sale in such manner as is provided by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, ss. 19—21), which act confers also other powers on mortgagees, as to insure, and to appoint a *receiver* who shall receive the rents and profits as agent of the mortgagor (*z*).

By the Judicature Act, 1873 (*a*), a mortgagor entitled for the time being to the possession of land, as to which no notice of his intention to take possession thereof has been given by the mortgagee, may, in general, sue for such possession, or for the recovery of the rents or profits, or to prevent (or recover damages in respect of) any trespass or other wrong relative thereto, in his own name only, and without adding the mortgagee as a co-plaintiff with himself.

Secondly, as to estates by *Statute Merchant* and *Statute Staple* :—[These are nearly related to the *vivum vadium*

(*u*) *Jones* v. *Jones*, 8 Sim. 633; *Wilmot* v. *Pike*, 5 Hare, 14.

(*x*) *Goddard* v. *Complin*, 1 Ch. Ca. 119.

(*y*) *Corder* v. *Morgan*, 18 Ves. 344.

(*z*) 44 & 45 Vict. c. 41, ss. 19—24.

(*a*) 36 & 37 Vict. c. 66, s. 25 (5).

[before mentioned, both the statute merchant and the statute staple being securities for money, the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *De mercatoribus*, and thence called a statute merchant: the other entered into pursuant to the statute 27 Edw. III. stat. 2, c. 9, before the mayor of the "staple," that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns. Both these securities for debts were originally permitted only among traders for the benefit of commerce; and, when entered into, not only the body of the debtor might be imprisoned, and his goods seized in satisfaction of the debt, but also his lands might be taken by the creditor, till out of the rents and profits of them the debt was satisfied; and *during such time as the creditor so held the lands, he was termed tenant by statute merchant or statute staple.*] The benefit of this mercantile transaction was afterwards, by virtue of the statute 23 Hen. VIII. c. 6, extended to all the king's subjects, whether traders or not; and such recognizance *in the nature* of a statute staple was by that Act directed to be acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London, and to be enrolled and certified into chancery; but both securities are now in disuse.

Thirdly, the Estate by *Elegit*:—*Elegit* is the name of a writ, founded on the statute of Westminster the second (*b*), by which, after judgment in an action has been obtained, the sheriff gives the judgment creditor possession of the lands and tenements of the defendant, to be occupied and enjoyed by the plaintiff (as judgment creditor) until the money due on the judgment is fully paid; *and during the time the judgment creditor so holds the lands, he is called*

(*b*) 13 Ed. I, c. 18; Hist. Eng. Law, by Reeves, vol. ii. p. 187.

tenant by elegit, his estate being a mere conditional estate, defeasible as soon as the judgment debt is levied (*c*).] And by this writ, at one period, only one-half of the lands of the judgment debtor could be seized in execution, the statute of Westminster the second (A.D. 1285) not extending (just as voluntary alienation did not then extend) (*d*) to the whole of his lands, but permitting them to be only partially affected by the process of law for his ordinary debts (*e*),—though by the statute *De mercatoribus*, passed in the same year, the *whole* of a man's lands were made liable on a statute merchant, for a debt contracted in trade. And such continued to be the state of the law as to the writ of elegit, until the modern statute 1 & 2 Vict. c. 110, which for the first time enabled the judgment creditor to seize upon that writ the *whole* of the judgment debtor's lands and tenements (*f*).

[And regarding all these estates by statute merchant, statute staple, and elegit,] and also (since the Conveyancing Act, 1881) regarding even the mortgagee's estate, [though the tenants are said to hold *ut liberum tenementum* until their claims are satisfied, yet are their estates but chattels, and pass to their *personal representatives* (*g*),—which is probably owing to this, that, being a security and remedy provided for personal debts due to the deceased, to which debts his personal representative is entitled, the law has therefore thus directed their succession, judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. And, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands is only a chattel interest, and on the

(*c*) *Dighton* v. *Greenvil*, 2 Vent. 327 ; *Price* v. *Varney*, 3 Barn. & Cress. 733.

(*d*) Wright's Ten. 154.

(*e*) 13 Ed. 1, c. 18.

(*f*) 1 & 2 Vict. c. 110, s. 11.

(*g*) Co. Litt. 42 a, 43 b ; 2 Inst. 322.

[death of such executor shall go to *his* executors (*h*),—*scil.*, because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.]

(*h*) Co. Litt. 42 a.

CHAPTER VII.

OF ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners may have therein. We are now to consider them with regard to the *time of their enjoyment*, as being either estates in *possession* or estates in *expectancy*. Where a man is entitled immediately to the possession, by virtue of any of the estates or interests which we have been considering, his estate is said to be in possession (*a*) ; and when entitled to it, not immediately, but at some future time, his estate is said to be in expectancy ; and of such expectancies, there are, at the common law, two sorts, the one a *reversion* and the other a *remainder*.

I. Of estates in *possession* not much remains to be said ; but it is material to remark, that a man may have an estate in possession in land, and may yet not be in actual possession of the land ; for he may have been *disseised* or otherwise *ousted* of the possession (*b*),—but in such a case, he will still retain an estate in possession, according to the sense in which that term is now used ; and as being the true owner, he is also said to have the *right of possession* (*c*),—as opposed to the mere *naked possession* of the

(*a*) Blackstone (vol. ii. p. 163) defines 'estates in possession as "those whereby a present interest "passes to and resides in the "tenant" ; and in 2 Cruise, Dig. 258, it is said "that estates in "possession are those where the "tenant is entitled to the actual "*pernancy* of the profits."

(*b*) Co. Litt. 181 a ; *Taylor* v. *Horde*, 1 Burr. 60 ; *Doe* v. *Perkins*, 3 Mau. & Sel. 275.

(*c*) Gilb. Ten. 21.

wrongdoer ; and his right of possession involves also the *right of entry*, that is, the right of entering upon and taking possession of the land withheld, if he can do so without breach of the peace, or otherwise the right to bring an action of ejectment or action for the recovery of the possession of the land ; and on the other hand, the naked possession of the wrongdoer is capable—by length of time and the neglect of the true owner to assert his right—of ripening, after a certain period (fixed, in general, at twelve years), into a lawful and indefeasible estate (*d*).

II. An estate in *reversion* is where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived ; and the derivative estate is called the *particular estate* (as being only a part or *particula* of the original one), and the ulterior interest is called the *reversion* (*e*). Thus, when the owner of the fee simple creates an estate in tail, or an estate for life or for years, the residue of the fee simple which is undisposed of is the reversion expectant upon the particular estate in tail, for life, or for years, so created, and continues vested in him who was before the owner of the whole, *ipso facto* and without any special reservation for the purpose (*f*),—for where a smaller estate is merely taken out of a larger, the residue remains, of course, in the original proprietor ; and such reversion is an actual estate (*g*), but an estate in expectancy only, and not in possession, because the reversioner, after creating the particular estate, has no right to the possession until the particular estate is determined.

(*d*) 37 & 38 Vict. c. 57.

(*e*) Lord Coke says, "A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as in the case tenant in fee simple maketh gift in tail, &c." (Co. Litt. 22 b.)

(*f*) Litt. s. 19.

(*g*) *Wiscot's Case*, 2 Rep. 61 ; see *Doe* v. *Gatacre*, 5 Bing. N. C. 619.

The tenant of a particular estate in tail, for life, or for years, holds of the reversioner, by fealty and by such services as are reserved between them; and the usual *incidents* to reversions are therefore said to be fealty and rent; and if no rent be reserved, fealty is reserved. The fealty so reserved is an inseparable incident of the reversion; but the rent, when rent also is reserved, although incident to, is not inseparably incident to, the reversion,—*scil.*, because the rent may be granted away, reserving the reversion; and, by special words, the reversion may be granted away, reserving the rent; although by a *general* grant of the reversion, the rent will pass with it as incident thereto, though by the grant of the rent generally, the reversion will not pass (*h*).

Where a freehold reversion (that is, a reversion in fee, in tail, or for life) is expectant on a particular estate of freehold, the reversioner is said to be "seised of the reversion *as of fee*" (or, if his estate be for life, "*as of freehold*"),—and not to be "seised of the land *in his demesne* as of fee" (or "as of freehold"), as in the case of an estate in possession. But if a freehold reversion be expectant on a particular estate for years, it is in that case correct to describe the reversioner as "seised of the land *in his demesne* as of fee;" for (owing to the small regard paid to chattel interests) his estate is considered as amounting (for many purposes) to a freehold estate in possession, the possession of the termor constituting the seisin of the freeholder (*i*); wherefore of a reversion expectant on a particular estate of freehold, no dower or curtesy can be claimed, but it is otherwise of a reversion expectant on a term of years (*k*).

By the principles of the *common law*, if the tenant of the particular estate for life or for years made a conveyance by feoffment, for an estate not warranted by the

(*h*) Co. Litt. 151 b, 152 a.

(*i*) Co. Litt. 330 b, n. (1); *Doe* v. *Finch*, 4 B. & Adol. 305.

(*k*) Co. Litt. 29 b, 32 a; 2 Bl. Com. 127; *Stoughton* v. *Leigh*, 1 Taunt. 410.

nature of his interest,—as where tenant for life made a feoffment in fee, or tenant for years a feoffment for life, that destroyed the particular estate, by converting it into a new and wrongful one, and by consequence it *displaced* or *divested* the reversion in expectancy thereon ; and it also operated as a *forfeiture* to the person in reversion, giving him an immediate right to enter and take possession, and so to defeat the wrongful estate so created (*l*) ; but now, under the 8 & 9 Vict. c. 106, s. 4, a feoffment made after 1st October, 1845, has no such tortious operation.

[Another incident connected with estates in reversion, is "merger" ; for it is a general principle of law, that where a greater estate and a less estate coincide in one and the same person, without any intermediate estate (*m*), the less estate is immediately annihilated or *merged*, that is sunk or drowned, in the greater ; *e.g.*, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But in order to this merger of estates, the estates must come to one and the same person, *in one and the same right* ; for if the freehold be in his own right, and he has the term in right of another (*en autre droit*), there is no merger (*n*) ; and if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge,—*scil.*, because he hath the fee in his own right, and the term of years in the right of the testator, subject to his debts and legacies. So, also, if he who hath the reversion in fee marries the tenant for years, there is no merger : for he hath (or had) the inheritance in his own right, and the lease in the right of his wife (*o*). Moreover, an estate tail is an exception to

(*l*) Litt. s. 415 ; Co. Litt. 251 a, b ; *Chudleigh's Case*, 1 Rep. 135 b ; *Archer's Case*, *ibid.* 66 b ; *Doe* v. *Gatacre*, 5 Bing. N. C. 609.

(*m*) *Duncomb* v. *Duncomb*, 3 Lev. 437.

(*n*) *Jones* v. *Davies*, 5 H. & N. 766.

(*o*) *Bracebridge* v. *Cook*, Plowd. 418 ; Co. Litt. 338 b ; Fearne's Cont. Rem. 341, 9th edit. ; 36 & 37 Vict. c. 66, s. 25.

[the general law of merger ; for a man may have, in his own right, both an estate tail and a reversion in fee ; and the estate tail, though a less estate, shall not merge in the fee (*p*),—*scil.*, because estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis* (*q*).]

Merger is not confined to cases where one of the coinciding estates is higher in *quality* or is greater in *quantity* than the other ; for a term of years will merge in the immediate reversion, though that be a chattel interest also ; and even where the term of years in reversion is of shorter duration than the term on which it is expectant, the merger will equally take place (*r*) ; also, a fee simple conditional will merge in the possibility of reverter (*s*).

By the 8 & 9 Vict. c. 106, s. 9, where the immediate reversion on a lease for years is merged in the next ulterior estate, that ulterior estate becomes (for all the purposes of the lease) the immediate reversion on the lease.

By the 36 & 37 Vict. c. 66, s. 25, sub-s. (4), there is now to be no merger, *by operation of law only*, of any estate the beneficial interest in which would not be deemed to be merged in equity ; and it was the rule of equity to deny a merger in all cases where any beneficial right or interest would be unjustly affected thereby.

III. An estate in *remainder* is or arises where after the creation of one estate out of a larger one an ulterior estate immediately expectant on that prior estate is at the same time (*and by the same conveyance*) also created out of the

(*p*) *Wiscot's Case*, 2 Rep. 61 a ; *Lord Stafford's Case*, 8 Rep. 74 b.

(*q*) *Hughes* v. *Robotham*, Cro. Eliz. 302.

(*r*) Bac. Abr. Leases, &c. (S.) 2 ; 3 Prest. Conv. 182 ; *Doe* v. *Walker*, 5 Barn. & Cress. 111.

(*s*) *Simpson* v. *Simpson*, 4 Bing. N. C. 333.

larger estate ; and in the case of such successive estates so simultaneously created, the prior one is called the particular estate, and the ulterior one the remainder (*t*). [As if a man seised in fee simple granteth lands to A. for twenty years, and (after the determination of the said term) then to B. and his heirs for ever ; here A. is tenant for years, remainder to B. in fee,—an estate for years being created or carved out of the fee, and given to A., and the residue or remainder being given to B. ; both which interests are in fact only one estate, the term of years and the remainder, when added together, being equal only to one estate in fee (*u*), the prior estate being in possession, the ulterior in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term, to B. for life, and after the determination of B.'s estate for life, to C. and his heirs for ever : this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions ; there is first A.'s estate for years carved out of it ; and after that B.'s estate for life ; and then the whole that remains is limited to C. and his heirs ; and yet here also the first estate, and the two remainders are (or amount to) one estate only, being nothing but parts or portions of one entire inheritance ; and if there were a hundred remainders, it would still be the same, for all the parts are equal, and no more than equal, to the whole ; and therefore, no remainder can be limited after the grant of an estate in fee simple (*x*),—*scil.*, because he that is tenant in fee hath in him the *whole* of the estate.]

From what has been premised, it appears that a reversion and a remainder are both estates in expectancy,

(*t*) Lord Coke defines a remainder as "a remnant of an estate in "lands or tenements, expectant "upon a particular estate created "together with the same at one "time." (Co. Litt. 143 a).

(*u*) Co. Litt. 143 a ; Fearne, by Butler, 308, 9th ed.

(*x*) *Gardner* v. *Sheldon*, Vaugh. 269.

but differ in this respect, that the former remains in the grantor, by act or construction of law, as part of his former estate, but a remainder is an estate newly created by the act of the grantor. And here it is very material to remark, that it is *only* by way of remainder that a man could, by the old *common law*, create a new freehold estate in expectancy, in a corporeal hereditament ; for by that law, a freehold in hereditaments corporeal could not be created to commence *in futuro* (*y*)—that is, without the interposition of a particular estate on which it should depend and be expectant. Thus, if A., seised in fee of lands, convey them to B. to hold to him and his heirs, after the end of the three years next ensuing, in fee simple for ever, that conveyance is, by the common law, merely void; and the reason is, that no freehold can be created at common law, in a corporeal hereditament, without livery of seisin (*z*),—a ceremony which is in its nature incompatible with any grant of the freehold *in futuro* ; for livery imports a delivery of possession, and consequently supposes that a right to the immediate possession, and not merely to a future estate, is conveyed by the feoffor. And as it is the necessity for this livery which constitutes the reason of the rule, so the rule itself extends not to mere chattel interests (*a*), — all which last-mentioned interests are therefore capable (even at common law) of being made to commence *in futuro* ; *e.g.*, a lease for seven years from next Michaelmas would be good. But when a particular estate is first created, a freehold in *remainder* can be readily limited thereon,—for the livery of seisin is made to the particular tenant, and (when so made) enures also to the remainder-man, the two estates being one and the same estate in law. [Thus, a man may convey to A. in tail, remainder to B. in fee, and the same livery which conveys the estate tail to A. will also pass the remainder expectant

(*y*) *Barwick's Case*, 5 Rep. 94 b ; 2 Bl. Com. 165.

(*z*) Co. Litt. 217 a ; Plowd. 156 ; *Barwick's Case*, 5 Rep. 94 b ; Bac. Ab. Remainder (C).

(*a*) 5 Rep. 94 ; Bl. Com. *ubi sup.*

[thereon to B., the whole estate passing at once from the grantor to the grantees, and the remainder-man becoming seised of his remainder, at the same time that the particular tenant becomes seised of his estate tail (*b*)] ; and the case is the same where the particular estate is for years only, as where X. leases to A. for three years, with remainder to B. in fee, and makes livery to A., the livery not being necessary for the lessee himself,—because he has but a chattel,—but enuring for the benefit of him in remainder ; and the freehold is thereby vested in B. immediately during the continuance of A.'s term of years (*c*).

With respect to the creation of a remainder, the following are the rules to be observed :—

[1. *There must be some particular estate precedent to the estate in remainder* (*d*) ; for remainder is a *relative* expression, and implies that some part of the thing is previously disposed of ; and as no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder (*e*),—for an estate at will is of a nature so slender and precarious that it is not to be looked upon as a portion of the inheritance at all.]

2. *A remainder must commence or pass out of the grantor, at the time of the creation of the particular estate* (*f*) ; therefore, where it is proposed to give A. an estate for life, with remainder to B. in fee, B.'s remainder in fee must pass from the grantor, at the same time with A.'s life estate in possession ; for if the estate, ulterior to that for life, continues in the grantor, it is a reversion, and no remainder ; and B. can take only by subsequent grant of that reversion.

(*b*) Co. Litt. 143 a.
(*c*) Co. Litt. 49 a, 49 b.
(*d*) Fearne, by Butler, p. 390, 9th edit.
(*e*) *Lord Stafford's Case*, 8 Rep. 75 a.
(*f*) Plowd. 25 ; Litt. s. 721 ; Bac. Ab. Remainder (C).

[3. *A remainder must be limited to take effect in possession immediately upon the determination of the particular estate, and neither later nor earlier* (*g*). Thus if A. be tenant for life, remainder to B. in tail, here B.'s remainder is to take effect in possession immediately upon A.'s death ; or if A. and B. be tenants for their joint lives, remainder to the survivor in fee, here, on the death of either, the remainder comes into possession instantly ; and therefore both these are good remainders. But if the future estate is to take effect in possession at any period *later* than the determination of the first,—as if an estate be granted to A. during his life, and upon his death and one day after to B. and his heirs,—this is no remainder (*h*). So the future estate will be no remainder, if it is not to *await* the proper and regular determination of the first ; as where an estate is limited to A. for life, but if B. pays him a certain sum of money, then immediately to B. and his heirs (*k*), the remainder to B. is no remainder, but is an estate which takes effect (if it ever do take effect) in defeasance of the prior particular estate in A. But though a remainder cannot be limited to take effect in possession until the particular estate regularly determines, yet eventually it may do so before that period ; for if the particular estate determine by act of law (as by forfeiture) before its natural expiration, the remainder limited upon it will come into immediate possession, and is not required to wait until the expiration of the period originally assigned.

A remainder, although in the mode of its creation it differs from, yet is in many of its incidents like to, a reversion. Thus, in the case of a freehold remainder, the remainder-man is seised as of fee (or as of freehold), but not "in his demesne,"—unless the particular estate be merely a term of years, when seisin in demesne may

(*g*) *Chudleigh's Case*, 1 Rep. 135 a ; *Boraston's Case*, 3 Rep. 21 a ; Co. Litt. 298 a.

(*h*) Fearne, by Butler, 307, 9th ed.

(*k*) Sugd. Gilb. 152 n. ; Fearne, by Butler, p. 261, 9th ed.

[be properly alleged. So *curtesy* or *dower* may be claimed of a remainder in fee, if expectant on an estate for years, but not if expectant on a freehold. Also, the wrongful feoffment of the tenant for life or for years, where the estate immediately expectant is by way remainder, had, at *common law*, the effect of displacing the remainder, and occasioning a forfeiture to the remainder-man, just as in the case of the reversioner,—which tortious operation was, however, checked (as we have seen) by the 8 & 9 Vict. c. 106, s. 4. Moreover, the union of an estate in remainder with the particular estate on which it is expectant, will produce a merger in the same cases (in general) and on the same principles, as if it were an estate in reversion (*l*).

Hitherto our remarks have related to remainders generally considered ; but it is now time to turn our attention to the distinction which exists between remainders, as being either *vested* or *contingent*. *Vested* remainders are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent ; as if A. be tenant for twenty years, remainder to B. in fee ; here B.'s is a vested remainder. *Contingent* remainders are those limited either to an uncertain *person*, or upon an uncertain *event*,—that is, to a person not *in esse* or not ascertained (*m*), or upon an event which may not happen at all, or not happen till after the particular estate is determined (*n*). The first kind, or those limited to an uncertain person, may be exemplified by a limitation to A. for life, remainder to the first son of B., who has then no son born,—for here the person is not *in esse* : or to A. and B. for their joint lives, remainder to the survivor in fee,—for here the survivor is not ascertained. The second kind, or those limited on an uncertain event, may be exemplified by a lease to A. for life, remainder to B. for life, and if B. should die before A., then the remainder to C. for life,—for B.'s dying before A. is an event that may never happen,

(*l*) Bac. Leases, &c. (S) 2. *Doe* d. *Bills* v. *Hopkinson*, 5 Q. B. 228.
(*m*) Fearne, by Butler, p. 9 ; (*n*) Fearne, *ubi sup.*

[and therefore the remainder to C. is contingent; also, if there be a lease to A. for life, and after the death of B. the lands are to remain to another in fee,—for though it is certain that B. must die, his death may not happen until after A.'s life estate shall be determined. On the other hand, if there be no uncertainty either in the person or in the event, the mere uncertainty whether the remainder will ever take effect in *possession*, is not sufficient to give it the character of a contingent remainder; *e.g.*, in the case of a lease to A. for life, remainder to B. for life, the limitation of the remainder to B. is to a person in being, and ascertained, and the event on which it is limited is certain, viz. the determination of A.'s life estate; and it is therefore a vested, and not a contingent, remainder (*o*), and yet it may possibly never take effect in possession,—because B. may die before A. So, also, an estate limited to an existing and ascertained person (B.) upon the determination of an estate tail, is a vested and not a contingent remainder,—for it is considered in law, that the estate tail, being a particular estate, is sure to come to an end, and that the failure of issue is consequently not a contingency, but a certain event; and the case falls, therefore, within the definition of a vested remainder, the estate limited to B. being one that is invariably fixed to remain to a determinate person after the particular estate is spent.

No remainder, as we have already pointed out, can be limited after a fee simple; a contingent remainder may, however, be limited in *substitution* for another contingent remainder in fee simple; as if land be given to A. for life, and if he have a son, then to that son in fee; and if he have no son, then to B. in fee (*p*); and this has been sometimes called *a contingency with a double aspect* (*q*); and such remainders as these are *concurrent* and not

(*o*) *Doe* v. *Scudamore*, 2 Bos. & Pul. 296.

(*p*) *Loddington* v. *Kime*, 1 Lord Raym. 208; *Keene* v. *Dickson*, 3 T. R. 495.

(*q*) *Loddington* v. *Kime*, *supra*.

[*consecutive*, both being remainders on the particular estate, and not remainders on each other (*r*).

And with reference to the nature of the contingency on which a remainder may be limited, it is laid down by Lord Coke, that it must be *potentia propinqua*, which he also designates a *common possibility*, and not *potentia remota*, by which he means a possibility that cannot reasonably be expected to happen (*s*) (sometimes called a *double possibility* or a *possibility upon a possibility*) (*t*); and the law certainly favours simple (or common) possibilities, not caring to encourage limitations of estates which are attended with a capricious uncertainty (*u*).

Contingent remainders are subject to the following two general rules :—

1. *If they amount to a freehold, they cannot be limited on an estate for years, or on any other particular estate less than a freehold estate.*—Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void ; but if granted to A. for life, with a like remainder, it is good (*x*). For, unless the freehold passes out of the grantor at the time when the contingent freehold remainder is created, such remainder is void (*y*) ; and the freehold cannot pass out of the grantor without vesting somewhere, and in the case of a contingent

(*r*) Inasmuch as a contingent remainder in fee is a disposition (subject to the particular estate) of the *whole* inheritance, a question has been raised as to what becomes of the inheritance in the meantime. According to the older authorities, it is in *abeyance*, or (according to Lord Coke) *caput inter nubila condit* (Co. Litt. 342 b ; and see Year Book, 40 Edw. 3, 9) ; but according to Mr. Fearne, it continues in the grantor (Fearne, *ubi sup.* p. 350) ; and certainly, where the contingent remainder in fee is created by a conveyance operating under the Statute of Uses (as to which hereafter), the fee remains in the grantor till the contingency happens ; and where it is created by a will, the fee descends in the meantime to the heir-at-law.

(*s*) *Cholmley's Case*, 2 Rep. 51 ; Co. Litt. 378.

(*t*) *Cole* v. *Sewell*, 4 Dru. & War. 1, 32.

(*u*) *Whitby* v. *Mitchell*, 44 Ch. D. 85.

(*x*) *Chudleigh's Case*, 1 Rep. 130 a.

(*y*) Fearne, *ubi sup.* p. 281.

[remainder, it must either vest in the particular tenant, or it vests nowhere,—unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

2. *Every contingent remainder must become vested either during the continuance of the particular estate, or* eo instanti *that it determines.*—When the contingent person comes into being or is ascertained during the continuance of the particular estate, or the contingent event takes place during that period, the remainder ceases to be contingent, and becomes a vested remainder ; *e.g.*, if A. be tenant for life, with remainder to B.'s eldest son, then unborn, in tail,—the instant that a son is born during the continuance of the particular estate, the remainder is no longer contingent, but vested (*z*). On the other hand, although the person comes not into being, or is not ascertained, or the event does not happen during the continuance of the particular estate, yet if such person or event comes into being, or is ascertained, or happens, although at the last moment (*i.e.*, immediately on the determination of the particular estate), the remainder then of course takes effect as an estate in possession, or (in other words) vests in possession ; *e.g.*, if land be given to A. and B. during their joint lives, remainder to the survivor in fee,—this remainder, immediately on the death of either, becomes vested in possession in the survivor. And it followed from this second rule, that so long as a remainder was in contingency, it always required the *continuing* support of the particular freehold estate (*a*) ; so that if that estate by any means came to an end before the contingency happened, the remainder was altogether *defeated* (*b*) ; for before the happening of the contingency, there was no person entitled to take the remainder or in whom it could vest, and (by the rule under consideration) it could no

(*z*) *Archer's Case*, 1 Rep. 66 b ; Co. Litt. 298 (a) ; Bac. Ab. Remainder (D.) ; 2 Saund. by Wms, 387, n. (7).

(*a*) *Colthirst* v. *Bejushin*, Plowd. 25.

(*b*) *Purefoy* v. *Rogers*, 2 Saund. 386, 387 ; 2 Bl. Com. 171.

[longer exist as a contingent remainder, because the particular estate was determined. For example, if A. were tenant for life, with remainder to B.'s eldest son, then unborn, in tail, and A. died before the contingency happened, that is, before B. had a son, the remainder was absolutely gone,—for the particular estate was determined before the remainder could vest (*c*) ; and in one case (*d*), where A., tenant for life under a will, with remainder to his own eldest son in tail, died without issue born, but leaving his wife *enceinte*, and after his death a posthumous son was born,—it was held, that, by the strict rule of law, this son could not take the land by virtue of the remainder, the particular estate having determined before there was any person actually in existence in whom the remainder could vest ; but the decision was reversed in the House of Lords ; and the law on this subject now depends on that judgment and on a statute subsequently passed (10 & 11 Will. III. c. 16), which enacts, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime. And here we may conveniently mention, that where a posthumous child takes by way of *remainder*, he is entitled to the intermediate profits from the death of his parent,—although where he takes by *descent*, divesting the estate which has meanwhile vested in the heir, he takes only from the time of his birth (*e*).

A contingent remainder used to be defeated not only by the natural determination or expiration of the particular estate on which it depended, but even by the premature determination of that estate,—*e.g.*, when the estate determined prematurely by the voluntary act of the particular tenant himself (*f*) ; so that a tenant for life, with remainder to his unborn son in tail, remainder over to a stranger in fee, might, before a son was born, by

(*c*) 2 Bl. Com. 169.

(*d*) *Reere* v. *Long*, 1 Salk. 228 ; 4 Mod. 282.

(*e*) *Thellusson* v. *Woodford*, 11 Ves. 139 ; *Goodtitle* v. *Newman*, 3 Wils. 526.

(*f*) *Chudleigh's Case*, 1 Rep. 135 b ; *Archer's Case*, *ibid.* 66 b

[destroying his life estate (*e.g.*, by a wrongful feoffment in fee, or by a surrender of his life estate to the ultimate fee simple remainder-man) have defeated the contingent remainder to his son (*g*) ; and it was, therefore, necessary in such a case to have trustees appointed to preserve the contingent remainders,—that is to say, persons interposed between the tenant for life and the contingent remainder-man, and in whom there was vested an estate for the *natural* life of the tenant for life (*h*) ; and then, if the estate for life determined otherwise than by death,—for example, by the tenant for life's wrongful alienation or surrender,—the estate of the trustees took effect during the residue of the natural life of the tenant for life, and that estate in the trustees was sufficient to support the remainder, or successive remainders, depending in contingency,—a method said to have been invented by Sir Orlando Bridgman and others.]

When land was settled by a limitation to the parent for life, and after his death to his first and other sons in tail, and trustees were interposed to preserve these contingent remainders to the sons, this was called a *strict settlement* ; and the estate tail expectant on the parent's life estate, was exempt from the danger of being defeated before the first son was born ; and it remained, of course, unalienable until that first son attained the age of twenty-one years.

[In order to support a contingent remainder, it was not, even at the common law, essential, that the particular estate should be in actual possession ; and it sufficed, though it were reduced to a *right of entry* (*i*) ; therefore if there were an estate for life, with a contingent remainder over, and the tenant for life was disseised, the right of entry in the disseisee would have been sufficient to support the remainder (*k*).]

The liability of contingent remainders to destruction has

(*g*) *Purefoy* v. *Rogers*, 2 Saund. 386, 387.

(*h*) *Parkhurst* v. *Smith*, Willes, 338 ; 3 Atk. 138.

(*i*) *Archer's Case*, 1 Rep. 66 b, 67 a.

(*k*) *Ibid.*

recently been materially altered: for, 1stly, By the 8 & 9 Vict. c. 106, s. 8, it has been protected against the *premature* determination of the prior particular estate, although not against the *natural* expiration of that estate,—that statute enacting, that "a contingent remainder existing at "any time after the 31st day of December, 1844, shall "be,—and if created before the passing of that Act, shall "be deemed to have been,—capable of taking effect, notwithstanding the determination by *forfeiture*, *surrender*, "or *merger*, of any preceding estate of freehold, in the "same manner, in all respects, as if such determination had "not happened"; and 2ndly, By the 40 & 41 Vict. c. 33, it has been protected (to some extent) even against the *natural* expiration of the prior particular estate,—that statute enacting, that every contingent remainder created by any instrument (including a will) executed after the 2nd August, 1877, which would have been valid as a springing or shifting use, or executory devise, or other executory limitation, shall,—in the event of the prior particular estate determining before the contingent remainder vests,—be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, or other executory limitation.

[In connection with the subject of remainders, the rule of construction which is called the *Rule in Shelley's Case* (*l*), demands our consideration. The rule, as propounded in Lord Coke's Reports is in the following form:—That wherever a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited (either mediately or immediately) to his *heirs* in fee or in tail, the word *heirs* is a word of *limitation*, and not of *purchase* (*m*); that is to say, the word "*heirs*" is to be understood as expressing the quantity of estate which the

(*l*) *Bradley* v. *Cartwright*, Law Rep., 2 C. P. 511; *Cooper* v. *Kynoch*, Law Rep., 7 Ch. App. 398.

(*m*) *Shelley's Case*, 1 Rep. 104 a; *Curti* v. *Price*, 12 Ves. 89.

[party is to take, and not as conferring any distinct estate on the persons who may become his heirs. And here let it be observed, that this is the *ordinary* force of the word *heirs* ; for if land is given to a man and his heirs, the man takes a fee simple ; and the word "*heirs*" plainly operates as a mere limitation of the quantity of his estate. And where land is given to A. for his life, and on his decease to his heirs, or to the heirs of his body,—in such a case, and by the effect of the *Rule in Shelley's Case*, the heirs, or heirs of the body, of A. will not take in remainder, nor will A. himself take a mere life estate, but A. will take a remainder also, in fee or in tail ; and as that remainder will absorb (and merge) his life interest, the result upon the whole conveyance will be to give A. an *estate in fee* (or in *tail*, as the case may be) *in possession*. And even if another particular estate (for example, a life estate to B.), be interposed between the life estate of A. and the ulterior limitation to A.'s heirs (or to the heirs of A.'s body), that ulterior limitation will take effect in A. himself, but as a vested remainder only, because of the intervening estate in B. which will prevent the merger.] And here, note, that if the estate interposed be a contingent remainder, A. will take the entire fee,—for while the contingency is in suspense, there is nothing to prevent the consolidation of his life estate with his ulterior fee simple estate ; yet A. (in such a case) takes the entire fee *sub modo* only, that is to say, it will (either under the 8 & 9 Vict. c. 106, or under the 40 & 41 Vict. c. 33,) open and let in the intermediate estate, if and when the contingency happens (*n*).

In order to assist such persons as have any estate in remainder, reversion, or other expectancy after the death of others, against the fraudulent concealment of their deaths, it is enacted by the 6 Anne, c. 18 (*o*), that all persons on whose lives any lands or tenements are holden shall (upon application to the court and order made thereupon)

(*n*) Fearne, by Butler, p. 29; *Lewis Bowles's Case*, 11 Rep. 79 b.

(*o*) In Revised Statutes, c. 72.

once in every year, if required, be produced to the court or its commissioners, failing which production, they shall be taken to be dead, and the person entitled to the expectant estate may enter upon and hold the lands, until it is shown (if it should be shown) that the life is still continuing (*p*). And in order to protect (and immediately assure) the title to reversions upon the sale thereof, it is enacted by the 31 Vict. c. 4, that no purchase of any reversionary interest which shall have been made *bonâ fide* and without fraud or unfair dealing, shall hereafter be set aside merely on the ground of *under-value*—a circumstance which (as the law was previously administered in the courts of equity) was in some cases held to vacate the transaction (*q*).

Under divers special Acts,—*e.g.*, under the Lands Clauses Consolidation Act, 1845 (*r*),—the owner of the prior particular estate (*i.e.*, the tenant for life) is enabled, for the specific purposes of the Act, to sell and convey the entire fee,—and so to defeat the remainders and reversion ; and under the Settled Estates Act, 1877, and Settled Land Act, 1882, hereafter dealt with more specifically (*s*), the tenant for life may in all cases sell and convey the entire fee, provided he duly comply with the provisions in that behalf contained in those Acts respectively ; but in all these cases, the purchase moneys are (in effect) substituted for the land sold, the remainders and reversion being (in effect) re-created therein.

(*p*) *Re Isaac*, 4 Myl. & Cr. 11 ; *Re Lingen*, 12 Sim. 104 ; *Re Thomas Stevens*, 31 Ch. Div. 320.

(*q*) *Miller* v. *Cook*, L. R. 10 Eq. 641 ; *Tyler* v. *Yates*, L. R., 6 Ch. App. 665 ; *Nevill* v. *Snelling*, 15 Ch. Div. 679 ; *Fry* v. *Lane*, 40 Ch. Div. 312 ; and *Whittet* v. *Bush*. *ib.*

(*r*) 8 & 9 Vict. c. 18.

(*s*) Bk. II., pt. i., ch. 24.

CHAPTER VIII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

[We come now to treat of estates, with respect to the number and connection of their owners; for estates of whatever quantity or length of duration, and whether they be in possession or in expectancy, may be held either in severalty, or in joint-tenancy, or in coparcenary, or in common.

I. He that holds lands or tenements in *severalty*, or as sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein; and this is the most usual way of holding an estate; and there is nothing peculiar to be remarked concerning them. And with regard to the other three species of estates, in which there is always a plurality of tenants, they have this characteristic in common,—namely:—that the tenants hold *pro indiviso* (*t*),—one person not being seised (or possessed) exclusively of one acre, and another person of another (for then they would be tenants in severalty); but the interest and possession of each extends to every specific portion of the whole land of which they are joint-tenants, coparceners, or tenants in common; and though only one of them should happen to be in actual possession, yet his possession is considered (for many purposes) as the possession of all (*u*).

II. An estate in *joint-tenancy* is where an estate is acquired by two or more persons in the same land, by the

(*t*) Co. Litt. 189 a, 190 b, 163 a. *Doe* v. *Keen*, 7 T. R. 386; *Doe* v. *Pearson*, 6 East, 173.
(*u*) *Ford* v. *Grey*, 1 Salk. 285;

[same title (not being a title by descent), and at the same period, and without any limitation by words importing that they are to take in distinct shares (*x*). For example, if there be a conveyance of lands to A. and B., without more, this makes them joint-tenants of the freehold ; and if to A. and B. *and their heirs*, this makes them joint-tenants of the fee. The estate so acquired is called an estate in joint-tenancy (*y*), and sometimes an estate in *jointure*,—which word, as well as the other, signifies an union or conjunction of interests ; though in common speech the term *jointure* is usually confined to that estate, which, by virtue of the 27 Hen. VIII. c. 10, is created (as already explained) in full satisfaction and bar of dower.

An estate in joint-tenancy has several properties, which require to be distinctly pointed out ; and of these the principal are the following :—1. Among joint-tenants there is a *unity of title* (*z*),—that is, their estates must be created by one and the same act,—as by one and the same grant or one and the same disseisin (*a*). 2. The estate of joint-tenants *vests in them, in general, at one and the same period* (*b*) ; therefore, if, for example, an estate be granted to J. S. for life, with remainder to A. and the eldest son of B. (B. having no son at the time) and their heirs, A. does not take in joint-tenancy with B.'s eldest son, because A. takes a vested remainder in a moiety immediately on the execution of the conveyance, while the remainder in the other moiety does not vest until a son is born to B.; and even if a son is born to B. in J. S.'s lifetime, still A. had, up to that period, no joint interest with him ; and the tenancy, not having been from the first a joint tenancy, cannot become so afterwards; but in the case of remainder to A. and B. and their heirs, after a previous life estate, A. and B. take in joint-tenancy,—because they both take at once a vested remainder. 3. Among joint-tenants there

(*x*) Co. Litt. 180 a—188 b.
(*y*) Litt. s. 277.
(*z*) 2 Bl. Com. 181.
(*a*) Litt. s. 278.
(*b*) Bl. Com. *ubi sup.* ; Co. Litt. 188 a.

[is also a *similarity of interest* as regards the quantity of estate; that is to say, one joint-tenant cannot be entitled to one quantity of estate, and the other to a different; one cannot be tenant for life and the other for years; one cannot be tenant in fee, and the other in tail (*c*),—although they may be joint-tenants as to a portion of the fee, with a several interest in one or more of them as to the residue; for if land be granted to A. and B. for their lives, and to the heirs of A., A. and B. are joint tenants of the freehold during their joint lives, and A. has a several inheritance in fee simple; or if land be given to A. and B., and the heirs of the body of A., here both have a joint estate for life, and A. has a several inheritance in tail (*d*); and 4. There is an *entirety* (and also an *equality*) *of interest* among the tenants; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the *whole*; and each is entitled to, and is capable of conveying (or transferring), an equal share with the rest,—which combination of entirety of interest with the power of transferring in equal shares, is expressed in the maxim, that every joint-tenant is seised *per my et per tout*. And this combination is an essential characteristic of the joint estate; and therefore if an estate in fee were given to a man and his wife, they were not properly joint-tenants, but were tenants by *entireties*,—for the husband and wife being considered as one person in law, they could not take the estate by moieties, but both were seised of the entirety, *per tout et non per my*; the consequence of which was, that neither the husband nor the wife could dispose of any part without the assent of the other, but the whole remained to the survivor (*e*); and if a joint estate in land was conveyed to husband and wife and a third party, the husband and wife took a moiety, and the third party took the other

(*c*) Co. Litt. *ubi sup.*
(*d*) Litt. s. 285.
(*e*) Litt. s. 665; Co. Litt. 187 b; *Beaumont's Case*, 9 Rep. 138 *Doe* v. *Parratt*, 5 T. R. 652.

[moiety, in the same manner as if the grant had been to two persons only (*f*) ;] and under the Married Women's Property Act, 1882 (*g*), that still holds practically true as regards property the title to which is conferred by a deed or will executed after the 31st December, 1882, the husband and wife being still considered, *quoad* the third party, one person in law, and therefore taking a moiety only, although as between themselves, they no longer hold by entireties, but each becomes the tenant of an undivided fourth part (*h*). But even under the old law, if the grant were made to husband and wife expressly to hold as tenants in common, they would have held accordingly (*i*), —which result may still be accomplished by a proper expression of the intention of the grantor in that behalf.

[From the entirety of interest in each of the joint-tenants results the incident of *survivorship*. For when two or more persons are jointly seised of a freehold interest in lands, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor, who shall be entitled to the whole estate (*k*) ; and the same is the law, where two or more are jointly possessed of a chattel interest in land. One joint-tenant has not a distinct moiety from the other, but while the joint-tenancy continues each joint-tenant has a concurrent interest in the whole ; and therefore it is, that on the death of his companion, the sole interest in the whole remains to the survivor,—for the interest which the survivor originally had, is clearly not divested by the death of his companion ; and no other person can now claim to have a *joint* estate with him,—*scil.*, an interest in the whole accruing by the same title ; nor yet a *separate* interest in any part of the tenements ; and as no one can now be admitted, either jointly or severally, to any share with

(*f*) Litt. s. 291.
(*g*) 45 & 46 Vict. c. 75.
(*h*) *Mander* v. *Harris*, 24 Ch. Div. 222; 27 Ch. Div. 166; *Jupp* v. *Buckwell*, 39 Ch. Div. 148.
(*i*) Co. Litt. 187 b.
(*k* Litt. ss. 280, 281.

[him therein, it follows that his own interest is entire and several, and to the whole estate.

The right of survivorship is called by our antient authors the *jus accrescendi*, because the right, upon the death of one joint-tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de personâ in personam, usque ad ultimam superstitem*" (*l*); and the rule is that *jus accrescendi præfertur oneribus* (*m*),—so that no dower or curtesy can be claimed out of a joint estate. Indeed, even where one of the joint-tenants aliened his share (which discharged it from any claim of his co-tenant in respect of survivorship), yet the wife of the alienor was not (even under the old law) entitled to her dower (*n*); for the land never was in the alienor's seisin, except as subject to the paramount claim of the survivor; and therefore there was no such sole seisin as that the dower could attach to it.]

Joint-tenancy may be destroyed:—

1. *By partition.* Thus, if two joint-tenants agree to part their lands, and to hold them in severalty, the effect thereof is to make them no longer joint-tenants,—for they no longer hold *pro indiviso*; and the right of survivorship, also, is by such separation destroyed (*o*); but by the 8 & 9 Vict. c. 106, s. 3, a partition of any tenements or hereditaments (not being copyhold) made after the 1st October, 1845, can only be completely and legally affected by *deed*.

By the common law, all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other (*p*),—for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without the consent of the others. But

(*l*) Bracton, l. 4, tr. 3, ch. 9, s. 3; Fleta, l. 3, ch. 4, s. 2.

(*m*) Co. Litt. 185.

(*n*) Co. Litt. 31 b, and n. 4, by Harg.

(*o*) Co. Litt. 188 a, 193 a.

(*p*) Litt. s. 290.

by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants were, in case of refusal by any of them, made compellable by *writ of partition* to divide their lands; and though this writ, together with the other antient forms of real action, was abolished by 3 & 4 Will. IV. c. 27, s. 36, joint-tenants are still compellable by action to make partition,—*scil.*, by proceedings in *equity*, praying or claiming that relief (*q*); and in such an action, the property may be (and very commonly is) sold, and the proceeds divided (*r*).

2. [*By alienation without partition.* As if one joint-tenant alienes and conveys (or even sells and agrees to convey) his estate to a third person; here the joint-tenancy is severed, and turned into a tenancy in common; for the grantee and the remaining joint-tenant hold by different titles,—one derived from the original, the other from the subsequent, grantor; though, till partition made, the undivided tenancy continues (*s*). And so, if one of two joint-tenants releases his share to the other, the joint-tenancy is dissolved, and turned to an estate in severalty (*t*). But a devise of one's share by will is no severance of the jointure, the *jus accrescendi* being preferred *ultimæ voluntati* (*u*),—for no testament takes effect till after the death of the testator; and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority to the other, is already vested (*x*).

3. *By an accession of interest.* Thus, if there be two joint-tenants for life, and the inheritance is purchased by

(*q*) Co. Litt. by Harg. 169 a, n. (2); 1 Fonbl. Tr. Eq. 18; *Landell* v. *Baker*, Law Rep., 6 Eq. Ca. 268; *Drinkwater* v. *Ratcliffe*, *ib.* 20 Eq. Ca. 528; *Burnell* v. *Burnell*, 11 Ch. D. 213; *Richardson* v. *Feary*, 39 Ch. Div. 45.

(*r*) 31 & 32 Vict. c. 40 (the Partition Act, 1868); 39 & 40 Vict. c. 17.

(*s*) Litt. s. 292; *Smith* v. *Sibthorpe*, [1894] 1 Ch. 362.

(*t*) *Avery* v. *Cheslyn*, 3 Ad. & El. 75.

(*u*) Co. Litt. 185 b; *Swift* v. *Roberts*, Ambl. 617.

(*x*) Litt. s. 287; 3 Burr. 1488; Co. Litt. *ubi sup.*

[or descends upon either, it is a severance of the jointure,—for such event renders their interests dissimilar as regards the quantity of estate (*y*) ; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance ; because being created by one and the same conveyance, they are not separate estates but branches of one entire estate (*z*).

It is proper to add, that whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it (*a*) ; but if one of three joint-tenants alienes his share the two remaining tenants, as between themselves, still hold their own shares by joint-tenancy and survivorship (*b*) ; and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that share, yet the two remaining shares are still *inter se* held in joint-tenancy (*c*).

In general, it is advantageous for the joint-tenants to dissolve the joint-tenancy,—since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-tenancy : as if there be two joint-tenants for life, and they make partition, this dissolves the joint-tenancy ; and, though before they each of them had an estate in the whole for his own life, and the survivor of them for the life of the survivor also, now each has an estate in a moiety only, and for his own life only ; and on the death of either, the reversioner shall enter on his moiety] (*d*).

It rather appears that when a female is entitled as a joint-tenant, her marriage alone is not a severance of the

(*y*) Cro. Eliz. 470.

(*z*) *Wiscot's Case*, 2 Rep. 60 ; Co. Litt. 182 b.

(*a*) "*Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.*" — Co. Litt. 188 a.

(*b*) Litt. s. 294.

(*c*) *Ibid.* s. 304.

(*d*) 1 Jones, 55 ; Co. Litt. 191 a.

joint-tenancy,—either as regards her estates of freehold or as regards her estates less than freehold (*e*).

[III. An estate in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons as his co-heirs, or co-heiresses (*f*); and this estate arises either by common law or by particular customs:—By common law, where a person seised in fee simple or in fee tail dies, and his next heirs are two or more females; and these co-heirs are then called *coparceners*, or for brevity, *parceners* only (*g*); though in some points of view the law considers them as together making only one heir (*h*). Parceners by particular custom are where lands descend, as in gavelkind, to all the *males* in equal degree, as sons, brothers, uncles, &c. (*i*).

An estate in coparcenary resembles, in some respects, an estate in joint-tenancy, there being the same unity of title and similarity (though not equality) of interest. But in the following respects they materially differ:—

1. Parceners always claim by *descent*, whereas joint-tenants always claim by *the act of parties*; for if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants (*k*); and hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or for years, may be held in joint-tenancy.

2. There is no *entirety of interest* among coparceners, but each of them is properly entitled to a distinct share (*l*); and there is no *jus accrescendi* or survivorship between them,—for each part descends severally to their respective heirs, though the undivided tenancy continues; and as

(*e*) *Bracebridge* v. *Cork*, Plowd. 416; *Palmer* v. *Rich*, [1897] 1 Ch. 134.

(*f*) Co. Litt. 163 a—180 a.

(*g*) Litt. ss. 241, 242.

(*h*) Co. Litt. 163 b, 164 a; Vin. Ab. Parceners (Q); *R.* v. *Bonsall*, 3 B. & C. 173.

(*i*) Litt. s. 265.

(*k*) *Ibid.* s. 254.

(*l*) Co. Litt. 163, 164.

[long as the lands continue in a course of descent, and are held *pro indiviso*, so long are the tenants therein, whether male or female, called parceners.

3. Though the interests of coparceners accrue by the same title, yet *they may accrue at different periods;* for if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other,—or when both are dead, their two heirs,—are still coparceners (*m*), the estates vesting in each at different times, though it be the same quantity of interest, and held by the same title.

4. And lastly, though persons related in equal degree to the ancestor are entitled in equal shares, yet as their heirs will represent them, or stand in their place, there is no necessary *equality of interest* among coparceners; and if a man die leaving four grand-daughters, three of them the issue of an elder daughter, and one of them the issue of a younger daughter, all four shall inherit, but the daughter of the younger shall take a moiety, that is, as much as all the other three (*n*).

Where one of two or more sisters, to whom lands descended in coparcenary, had an estate given to her in *frankmarriage* by the same ancestor from whom the lands descended, she could not take her share in the descended lands, without first adding to them her estate in frank-marriage,—in order that the whole property might be equally divided between all the sisters (*o*); which mode of division is called (in our law) bringing the lands into *hotch-pot* (*p*), a term explained by Littleton (*q*), as follows:—"It seemeth that this word, *hotchpot*, is in English a "pudding; for in a pudding is not commonly put one "thing alone, but one thing with other things together"; and by this housewifely metaphor our ancestors meant to

(*m*) Co. Litt. 164, 174.

(*n*) *Ibid.* 164b; and see *Cooper* v. *France*, 19 L. J. Ch. 313; *James* v. *Dickinson*, [1897] 2 Ch. 509.

(*o*) Bracton, l. 2, ch. 34; Litt. ss. 266—273.

(*p*) Britton, ch. 72.

(*q*) Litt. s. 267.

[inform us that the lands, both those given in frankmarriage and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters (*r*),—all this being left to the choice of the donee in frankmarriage,—who might choose not to put her own lands into hotchpot, in which case the descended lands went to the sisters in exclusion of herself. The law of hotchpot took place, then, only when the other lands descending from the ancestor were fee simple ; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her own lands into hotchpot (*s*) ; and the reason is, because lands descending in fee simple are distributed by the policy of the law, for the maintenance of all the daughters,—and if one has a sufficient provision out of the same inheritance equal to the rest, it is not reasonable that she should have more ; but lands descending in tail are not distributed by the operation of the law, but by the designation of the donor, *i.e.*, *per formam doni* ; and it matters not, in the latter case, how unequal this distribution may be. Also, no lands but such as are given in frankmarriage shall be brought into hotchpot,—for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion (*t*) ; and, therefore, as gifts in frankmarriage are fallen into disuse, the law of hotchpot would hardly have been worth notice, had not this method of division been revived and copied by the statutes "for the distribution of the personal estates of intestates," which we shall hereafter consider at large.

The modes of dissolving an estate in coparcenary are :—

(1.) *By partition.* Parceners are so called, saith Littleton, because they may be constrained to make "partition" (*u*) ; and he mentions many methods of

(*r*) Litt. s. 268.
(*s*) *Ibid.* s. 274.
(*t*) Litt. s. 275.
(*u*) *Ibid.* s. 241.

[making it, four of which were by consent and one was by compulsion (*x*). Of the four methods of making partition by consent,—the first is, where they agree to divide the lands into equal parts in severalty; and the second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age, or otherwise, as shall be agreed,—this privilege of seniority being personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister; but if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, upon the first turn the eldest and her issue,—nay, her husband, or her assigns,—shall present alone, before the younger, to whom the next turn will in that case belong (*y*),—for although the agreement to make partition is merely personal, yet this latter privilege, of presenting to the living, arises from the act of the law, and is annexed not only to the person of the eldest, but to her estate also. The third method of partition by consent is, where the eldest divides, and then she chooses last,—the rule of law being *cujus est divisio, alterius est electio*; and the fourth is, where the sisters agree to cast lots for their shares.] Partition by compulsion at the common law used to be, where one or more parceners sued out a *writ of partition* against the others; but that writ being now abolished, partition of an estate held in coparcenary can at present be compelled only by the judgment of the court, to be obtained in a partition action; and in all cases, the partition is completed by a *deed*, the 8 & 9 Vict. c. 106, s. 3, requiring a deed for this purpose, equally as in the case of a joint-tenancy.

[As regards things which are in their nature impartible,—the mansion-house, for example,—these shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in

(*x*) Litt. ss. 243—264.

(*y*) Co. Litt. 166 b; *Walker's Case*, 3 Rep. 22.

[other parts of the inheritance ; or if that cannot be, then they shall have the profits of the thing by turns, as in the case of the advowson (*z*).

An estate in coparcenary may also be dissolved, (2) *By the alienation of one of the parties*,—which destroys the unity of title ; or (3) *By the whole at last descending to and vesting in a single person*,—which brings it to an estate in severalty (*a*) ; and here it is important to add, that for the purposes of tracing descents, parceners, even after they have made partition, are still deemed to be *in by descent*, and not by the apparent title derived under the deed of partition (*b*).

IV. A *tenancy in common* is, where two or more hold the same land, with interests accruing under different titles ; or accruing under the same title (other than *descent*), but at different periods ; or conferred by words of limitation, importing that the grantees are to take in distinct shares (*c*). And in a tenancy in common, there is not necessarily any *unity of title*,—for one may hold by descent and the other by purchase ; or the one by purchase from A. and the other by purchase from B. ; nor any *unity in the time of vesting*,—for the one's estate may have vested fifty years ago, and the other's but yesterday ; nor any necessary *similarity* or *equality* of interest,—for one tenant in common may hold in fee-simple, and the other in tail or for life, and one may be entitled to two-thirds, and the other to one-third ; nor is there any *entirety* of interest,—for each is seised or possessed of a distinct (though undivided) share ; and it follows also that there is no *survivorship*,—unless there should be (and there may be) an express clause giving the benefit of survivorship (*cc*) ;

(*z*) Co. Litt. 164 b. 165 a.

(*a*) 2 Bl. Com. 191 ; *Doe* v. *Dixon*, 5 Ad. & El. 839.

(*b*) *Crosthwaite* v. *Dixon*, 5 Ad. & El. 634.

(*c*) Co. Litt. 188 b—201 a ; *Murray* v. *Hall*, 7 C. B. 441.

(*cc*) *Doe* v. *Abey*, 1 Mau. & Sel. 428.

[and, in fact, the only unity prevailing among such co-tenants is the unity of mere possession,—for they hold the same land *pro indiviso*.

Tenancy in common may arise out of a joint-tenancy, or out of a coparcenary; as if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common,—for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*d*); and if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the respective donees in tail are tenants in common, as holding by different titles and conveyances (*e*). Also, if one of two parceners alienes, the alienee and the remaining parcener are tenants in common (*f*),—because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life estate, but they shall have several inheritances (*g*),—because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and a woman*, and the heirs of their bodies begotten (*h*); and in this, and the like cases, their issues shall be tenants in common,—because they must claim by different titles, one as heir of A., and the other as heir of B.; and in short, whenever an estate in joint tenancy or in coparcenary is dissolved, but no partition is made, the undivided tenancy continuing, it is turned into a tenancy in common.

A tenancy in common may also be created by an express limitation to that effect in a conveyance; but here care must be taken to insert words implying that the grantees are to take distinct, though undivided, shares,—for a grant without such words would give a joint estate; and it is

(*d*) Litt. s. 292.
(*e*) *Ibid.* s. 295.
(*f*) *Ibid.* s. 309.
(*g*) *Doe* v. *Green*, 1 H. & H. 314.
(*h*) Litt. s. 283.

[laid down in our books, that the common law favoured joint-tenancy rather than tenancy in common (*i*), the divisible services issuing from land (as, for example, rent,) not being divided, and the entire services (as fealty) not being multiplied, by a joint-tenancy, as they are by a tenancy in common. Yet where land was given to two, to be holden the one moiety to one, and the other moiety to the other, this was an estate in common (*k*); and, where one granted to another *half* his land, the grantor and grantee were also tenants in common (*l*),—because joint-tenants do not take by distinct moieties; and by such grants the division of the estate is so plainly expressed, that it is impossible that they should take a joint interest in the whole of the tenements. But, on the other hand, an estate given, in a conveyance *inter vivos* at common law, to A. and B. *equally to be divided* between them, was said to be a joint-tenancy, as it implied no more than what the law had annexed to that estate, viz. divisibility (*m*). Such a limitation, however, in a will or in a conveyance founded on the Statute of Uses, (of which we shall have occasion to treat hereafter,) is certainly a tenancy in common (*n*),—for if the tendency of the antient law was to favour a joint-tenancy, the leaning in later times has been the other way (*o*), the right of survivorship being often inconvenient and harsh in its effects; and therefore in wills and in conveyances to uses,—both of which came into use in comparatively modern times, and with regard to which a more liberal construction is in some respects allowed than in the case of common law conveyances—a tenancy in common will sometimes be created by words which at common law would operate as a limitation in joint-tenancy.]

We may take this opportunity of remarking, that when lands are given to two or more as tenants in common, it frequently happens that a particular estate is limited to

(*i*) *Fisher* v. *Wigg*, Salk. 392.
(*k*) Litt. s. 298.
(*l*) *Ibid.* s. 299.
(*m*) *Fisher* v. *Wigg*, 1 P. Wms. 17.
(*n*) *Ratcliffe's Case*, 3 Rep. 59 b; 1 Ventr. 32; *Goodtitle* v. *Stokes*, 1 Wils. 341.
(*o*) *Joliffe* v. *East*, 3 Bro. C. C. 25; *Fisher* v. *Wigg*, 1 P. Wms. 14.

each of the grantees in his share, with remainder over to the other or others of them—as if a man give lands to his two children as tenants in common in tail, and direct that upon failure of the issue of one of them his share shall go over to the other in tail, and *vice versâ*. Such ulterior estates as these are called *cross-remainders*, because each of the grantees has reciprocally a remainder in the share of the other; and it is a rule respecting them, that in a *deed*, cross-remainders can be given only by express limitation, and shall never be implied (*p*); though it is otherwise with respect to *wills*, which are here, again, expounded more liberally, with a view to the presumable intent of the donor,—so that in these latter (*i.e.*, in wills), cross-remainders may be raised not only by actual limitation, but by any expression from which the design to create them can reasonably be inferred (*q*).

A tenancy in common may be disolved:—(1) *By partition*,—for tenants in common, like joint-tenants, were compellable by the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, (though not at common law,) to divide their lands by writ of partition; and since the abolition of that writ, they may be driven to a partition by means of proceedings in equity; but they may also effect a partition by mutual agreement without having recourse to the court, the 8 & 9 Vict. c. 106, s. 3, requiring, however, that the partition shall be completed by *deed*. A tenancy in common may also be dissolved (2), By the *uniting of all the titles and interests in one tenant*,—by purchase or otherwise,—which brings the whole to one severalty.

(*p*) *Cole* v. *Leringston*, 1 Vent. 224; *Doe* v. *Worsley*, 1 East, 416.

(*q*) 1 Prest. Est. 94, 115; and see Co. Litt. 195 b, n. (1), by Butler.

CHAPTER IX.

OF USES AND TRUSTS.

Uses and trusts were not identical in their origin (*r*) ; but they were closely related,—a *trust* having been a confidence reposed by one man in another whom he invested with the legal ownership of property ; and if the trust was to let another receive the profits, this right in the latter was called a *use* or *trust* indifferently, and merely in order to distinguish the beneficial right from the legal estate which was in the *trustee*.

The notion of a use or trust was transplanted into England from the civil law, about the close of the reign of Edward the Third (*s*) ; and the people who introduced it were the foreign ecclesiastics, their object being to evade the statutes of mortmain. For the religious houses to which these ecclesiastics belonged, were *corporations* ; and as corporations never die, the lands which belonged to them were consequently said to be *in mortuâ manu*, or in *mortmain*,—because they produced no advantage to the feudal lord by way of escheat or otherwise (*t*) ; and therefore, by the policy of the antient law, corporations were prohibited from the purchase of land, unless a licence in mortmain was obtained for the purpose,—a principle which was enforced by a variety of statutes, called the statutes of mortmain. However, the clergy (*scil.*, the lawyers) of the day were constantly exerting their ingenuity to evade the provisions of these statutes ; and one of their expedients was to obtain grants of land, not to the religious house itself, but to some person to hold to the *use* of the religious house.

(*r*) Co. Litt. by Butler, 271 b, n. (1), 290 b, n. (1).

(*s*) 1 Sand. Uses, p. 17

(*t*) Co. Litt. 2 b.

And a gift of this kind conferring, in contemplation of law, no estate or interest whatever on the corporation, the feudal tenure not looking further than to the legal estate in the ostensible owner (*u*), and the use being in fact a non-entity, the gift was clearly out of the statutes of mortmain, and the use or trust receiving no protection at law, was protected by the Court of Chancery,—a tribunal which administered justice upon the principles of *equity* (*x*).

[As regards the religious houses themselves, this evasive contrivance of uses proved to be of little avail, being crushed in its infancy by the 15 Rich. II. c. 5, whereby it was enacted that, for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves, unless the licence of the crown was first duly obtained. Yet the idea, being once introduced, took root in our system of jurisprudence, being chiefly recommended by two considerations—first, that uses were, as to the manner of their creation and transfer and the modifications of interest to which they might be subjected, free from the restrictive rules which applied to the old feudal estates; and secondly, because uses were not, in general, liable, like the feudal estates, to forfeiture for treason or felony (*y*); and it was owing to this latter exemption in particular, that, during the wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal, through the desire that men had of securing their estates from forfeiture when each of the contending parties, as they became uppermost, alternately attainted the other; and about the reign of Edward the Fourth, the courts of equity began to reduce them to something of a regular system (*z*).

With respect to the kinds of property that may be the subject of a use, in general, all corporeal hereditaments, whether in possession, remainder, or reversion,—and many

(*u*) 1 Cruise, Dig. 402.
(*x*) Hist. Eng. Law, by Reeves, vol. iii. p. 192.
(*y*) 33 Hen. 8, c. 20.
(*z*) Bac. Read. Uses.

[also that are incorporeal, for example, rents and advowsons,—may be granted to uses; but not ways, commons, and the like; or things *quæ ipso usu consumuntur* (*a*).

The use was commonly created as follows (and by express words), that is to say:—The owner or actual tenant of the land conveyed it by feoffment, upon the trust or confidence, which often rested upon merely oral agreement (*b*), that the feoffee should hold the land to the use of some third person, or of the feoffor himself (*c*): and the effect of this transaction was, that the legal seisin (or feudal tenancy) of the land became severed from the beneficial ownership (or use),—the former being vested in the trustee (otherwise called the *feoffee to uses*), and the latter in the person to whose use it was held, and who received the appellation of *cestui que use*; and of these divided interests, that of the feoffee alone obtained protection in the courts of common law, where he was considered the absolute owner; but in equity, the *cestui que use* was regarded as the true proprietor, and might compel the feoffee to uses to account to him for the rents and profits, and to hold the land at his disposal.

But the use might also be created by implication; and if *e.g.*, a man made a feoffment in fee to another, without any consideration, equity presumed that he meant it to be to the use of himself, and therefore raised an *implied* use for his own benefit (*d*),—unless, indeed, the feoffor expressly declared that the feoffment was to the use of another, and then of course nothing was presumed contrary to such express declaration (*e*); and uses which thus returned by way of implication to the grantor himself, were called *resulting* uses (*f*). A use might also be raised

(*a*) 2 Bl. Com. 330; 1 Sand. Uses, p. 70; 1 Cruise, Dig. 408; W. Jones, 127; Gilb. Uses, 485, 3rd ed. by Sugd.

(*b*) 1 Sand. Uses, p. 17.

(*c*) 1 Cruise, Dig. 392.

(*d*) 1 Sand. Uses, p. 68; Vin. Uses, F.; 1 Cruise, Dig. 442, 446, 450; Gilb. 118.

(*e*) 2 Bl. Com. 330.

(*f*) Cruise, Dig. *ubi sup.*; 2 Bl. Com. 335; *Doe* v. *Rolfe*, 8 Ad. & El. 650.

[upon a mere contract or covenant, without the formality of any conveyance (*g*) ; for if a man, in consideration of natural affection, *covenanted to stand seised of his land to the use* of some near relative named,—or to the use of a wife, actual or intended,—a court of equity, even though no valuable consideration passed, would enforce the use, treating the covenantor as a mere trustee thereafter for the *cestui que use* (*h*) ; and if a man *bargained and sold* his land to another for a pecuniary consideration, but made no actual feoffment or conveyance, equity would consider the estate as belonging to the party who had paid the money, and would consequently hold the bargainor to be seised of the land from thenceforth to the use of the bargainee (*i*).

In general, all persons were capable of holding to a use (*k*) ; but persons attainted and aliens were disqualified from doing so (*l*) ; and the doctrine was also established, that neither the king nor the queen, on account of their dignity royal,—nor any corporation aggregate, on account of its limited capacity,—could be seised to any use but their own (*m*). And the capacity of becoming a *cestui que use* (or *cestui que trust*) was even more extensive, all persons who had capacity to accept a conveyance of land being also capable of accepting a use (*n*).

As the person seised to uses (namely, the trustee) was considered by the common law as the absolute owner, his estate was of course subject originally to all the incidents which attached to the legal estate in ordinary cases ; and therefore it devolved to his legal representative at his death, and might be aliened or forfeited by his act while living, or become subject to his debts, or escheat for want of his heir ; and the wife of the trustee was also entitled

(*g*) 1 Sand. Uses, p. 118 ; vol. 2, p. 50 ; *Chudleigh's Case*, 1 Rep. 139 b.

(*h*) 2 Bl. Com. 304 ; Gilb. Uses, 93 ; Sugd. Introd. to Gilb. xlvii.

(*i*) 2 Sand. Uses, p. 50.

(*k*) 1 Sand. Uses, p. 62.

(*l*) *Ibid.* 65.

(*m*) 2 Bl. Com. 330 ; Sand. Uses, *ubi sup.*

(*n*) 1 Sand. Uses, p. 229.

[to her dower out of the trust estate ; and when the trustee was a married woman, her husband (surviving her) was entitled to his estate by the curtesy (*o*) ; also, the alienee deriving title from the trustee was in some cases entitled to hold free from the trust,—for the Court of Chancery gave relief originally only against the person himself in whom the trust was first reposed, and not against his alienees, although this was altered in the reign of Henry the Sixth with respect to the heir of the original trustee (*p*) ; and the alteration was subsequently extended to all alienees who had acquired from the trustee either without consideration, or with express notice of the trust or use (*q*). But a purchaser for value without notice, or a creditor obtaining execution, might still have held the land discharged of the trust or use (*r*) : and if the trustee died without an heir, or committed a forfeiture, or married, neither the lord who entered for the escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, —were liable to perform the trust or use,—because they were not parties to the original trust, but came in by act of law (*s*).

The use was in its nature so exclusively *equitable*, that the courts of common law accounted the *cestui que use*, if out of possession, a mere stranger, and if in possession, a mere tenant at sufferance ; and they allowed no effect to an alienation or demise of the land, if made by the *cestui que use* without the consent of the trustee ; and the use was not liable to forfeiture for the default of the *cestui que use*, nor to execution for his debts (*t*). In a court of equity, however, the properties or incidents of the use were in great measure assimilated to those of the legal estate becoming only more elastic ;

(*o*) 1 Sand. Uses, pp. 75, 76 ; 1 Cruise, Dig. 403 ; Gilb. Uses, by Sugd. 3rd ed. p. 15 ; 2 Bl. Com. 330.

(*p*) Keilw. 42 ; Year-book, 22 Edw. 4, c. 6.

(*q*) Keilw. 46.

(*r*) Gilb. Uses, by Sugd. *ubi sup.*

(*s*) 1 Sand. Uses, p. 229

(*t*) 2 Bl. Com. 331 ; 1 Sand. Uses, pp. 73, 74.

[and the properties or incidents of the use in a court of equity,—*i.e.*, of the equitable estate,—were principally as follows:—1. Contrary to the course of the common law with respect to freehold estates, uses even for life, or for a greater interest, might be created or assigned by secret deeds between the parties; and might also be devised (*u*), —for as the legal estate in the soil was not transferred by these transactions, no *livery of seisin* was necessary. 2. Uses might be limited for future freehold estates, not only by way of remainder, but also without any prior particular estate to support them,—estates in possession, reversion, or vested remainder, being called uses *in esse*, and those other future estates being called uses *in futuro*, *contingent* uses, or uses in *possibility* (*x*). 3. A use was not subject to forfeiture, and it did not escheat upon attainder, or other defect of blood,—for escheats and the like were the consequences of *tenure*, and uses were not the subjects of tenure. 4. Again, no wife could claim dower, or husband curtesy, out of a use (*y*); and therefore it became customary, when uses became general, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the origin of jointures. 5. Lastly, a use could not be extended upon a writ of elegit, or other legal process, for the debts of the *cestui que use*,—though the legal estate was liable to such execution for the debts of the legal tenant.

The state of things above described was, however, attended with many inconveniences; for, in the words of Lord Bacon (*z*), "a man that had cause to sue for land, "knew not against whom to bring his action, or who was "the owner of it; and a wife was defrauded of her thirds, "the husband of his curtesy, the lord of his escheat, the "creditor of his debt, and the tenant of his lease" (*z*).

(*u*) Bac. Read. Uses, 312, 308; 1 Sand. Uses, p. 72.

(*x*) *Chudleigh's Case*, 1 Rep. 136 b, 211 b; *Lovies' Case*, 10 Rep. 85 a; Bac. Read. Uses; Bac. Ab. Uses, (G).

(*y*) *Vernon's Case*, 4 Rep. 1 b; 2 And. 75.

(*z*) Bac. Use of the Law, 153.

[These inconveniences were, however, gradually remedied by a succession of statutes, under which the lands were made liable to be extended by the creditors of the *cestui que use* (*a*); and actions for the freehold were allowed to be brought against the *cestui que use* who was in the actual pernancy of the profits (*b*); and he was made liable for waste (*c*); and his conveyances and leases made without the concurrence of the trustee were declared good (*d*); and the feudal perquisites of the lord were protected (*e*).

The statutes which have just been referred to all tended more or less to make the *cestui que use* the real owner of the land (*f*); and this idea was carried out (in intention at least) by that celebrated Act passed in the reign of Henry the Eighth, (27 Hen. VIII. c. 10,) which is commonly called the *Statute of Uses*. Which statute, after reciting the inconveniences before mentioned (and others), enacted that, where any person or persons should be seised of lands (*g*) to the use, confidence, or trust of any other person or persons, or body politic, by any means whatsoever, (whether the use, confidence, or trust were in fee simple or in fee tail, for life or for years, or otherwise, and whether it was in possession, remainder or reverter,) the estate of the person or persons so seised to uses should be deemed to be in him or them that *had* (*i.e.*, who were beneficially entitled to) the use, trust, or confidence; and he or they should thenceforth stand and be seised or possessed of the said lands or other hereditaments of and for the like estates as he or they had in the use, trust, or confidence.

The effect of the statute is therefore to *execute* the use;

(*a*) 50 Edw. 3, c. 6; 2 Rich. 2, st. 2, c. 3; 19 Hen. 7, c. 15.

(*b*) 1 Rich. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1.

(*c*) 11 Hen. 6, c. 5.

(*d*) 1 Rich. 3, c. 1.

(*e*) 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

(*f*) 1 Rich. 3, c. 5.

(*g*) The words in the Act are "honours, castles, manors, lands, "tenements, rents, services, re-"versions, remainders, or other "hereditaments": 27 Hen. 8, c. 10, s. 1.

[that is, it instantaneously, and as "by a kind of parliamentary magic," transmutes the equitable interest of the *cestui que use* into a legal estate of the same nature, and makes the *cestui que use* the legal tenant in lieu of the feoffee to uses (or trustee) whose estate is annihilated (*h*). And sometimes under the statute, it is said, that the use is *transferred into possession* (*i*), the legal estate conferred on the *cestui que use* being considered as an estate in actual seisin or possession, and such as requires no further ceremony for its completion (*k*); and if, *e.g.*, a feoffment is made to A. and his heirs to the use of B. and his heirs, an estate in fee simple in possession is *eo instanti* vested by force of the statute, and without livery of the seisin, in B., A. taking nothing (*l*).

But in order to bring the statute into operation, it is essential that there should not only be a use, but a person *seised* to the use (*m*), the statute speaking of "one "person seised to the use of any other person"; and, therefore, where an existing term of years is limited to a use, as where a term of 1000 years is assigned to B. to the use of C., the provisions of the statute do not apply, and the use will consequently remain unexecuted,—for of such estates as these, (being mere chattels,) the termor is not *seised*, but only *possessed*; and therefore there is no person "seised to a use" as the statute requires (*n*). Upon the same principle of close adherence to the words of the statute, the seisin must be vested in a different person from the *cestui que use* himself,—for otherwise the case does not arise of *one* person being seised to the use of *another* (*o*); and the seisin should be for an estate as extensive as the use itself,—for the statute only executes

(*h*) 2 Bl. Com. 333.

(*i*) 1 Saund. 251, n. (2), 234 b, n. (4).

(*k*) *Burdett* v. *Spilsbury*, 6 Man. & Gr. at p. 456, *in notis*.

(*l*) *James* v. *Plant*, 4 Ad. & El. 766.

(*m*) 1 Sand. Uses, pp. 97, 113, 133.

(*n*) 1 Sand. Uses, p. 198; Gilb. Uses, 79; Bac. Read. Uses, 335 *Dillon* v. *Fraine*, Poph. 76.

(*o*) 1 Sand. Uses, p. 96.

[the use so far as there is a corresponding seisin; and if land be conveyed to A. for life to the use of B. in fee, the statute will vest the legal estate in B. only during the life of A. (*p*). Also, when land is conveyed by feoffment to A. and his heirs, to the use of B. for life, remainder to the use of his unborn sons successively in tail, remainder to the use of C. in fee, it is necessary in order that the statute should transmute all these uses into legal estates, that there should be a seisin out of which to execute not only the uses *in esse* to B. and C., but also the uses *in futuro* to the unborn sons of B.: and for this purpose, it was considered, that there remained in the feoffee, though not an actual seisin, yet a *scintilla juris*, or possibility of *future* seisin, to serve the future uses as they came into *esse*; and now, by the 23 & 24 Vict. c. 38, s. 7, such future uses are to take effect when and as they arise by force of, and by relation to, the original seisin in the feoffee to uses, but no *scintilla juris* is to be deemed to remain in the original feoffee to uses.

The Statute of Uses has been, in other respects also, very rigorously construed by the judges. Thus:—1. It was held that *no use can be limited upon a use* (*q*). Thus, where A., being seised, bargains and sells for a pecuniary consideration to B., the legal estate passes by force of the statute to B., to whom the use is limited by the effect of the bargain and sale; and where A. bargains and sells to B., *to the use of* C., the judges held that in this case also the legal estate passes to and remains in B., and that C. takes nothing,—for the statute executes the first use limited to B., but not the second use limited to C., the latter use being a mere nullity, inasmuch "as no use can "be engendered of a use" (*r*). Also, a feoffment to A. to the use of B. in trust for C., was held to vest the legal estate in B., and C. was allowed to take nothing (*s*); and

(*p*) 1 Sand. Uses, p. 113; Gilb. Uses, 430; *Meredith* v. *Jones*, Cro. Car. 244.

(*q*) Gilb. Uses, 347; 1 Sand. Uses, p. 198; *Gilbertson* v. *Richards*, 4 H. & N. 297.

(*r*) *Tyrrell's Case*, Dy. 155.

(*s*) Gilb. Uses, Sugd. lx.

[yet, when the first use was executed in B., he might, without much impropriety, have been considered as seised to the use of C.: but it was otherwise determined by the judges. 2. It was held also, that *where the person entrusted has any active duty to perform, he cannot be considered as holding to a use,—or at least not to such a use as the statute executes* (*t*). Thus, if lands be given to B. and his heirs, with a direction to *receive* and *pay over* the profits to C., this shall be no use in C.; though, on the other hand, if the direction were to *permit* C. *to take* the profits, this would be a use executed in C.,—there being no *active* duty in this latter case for B. to perform (*u*).

The uses which were thus in courts of law excluded from the operation of the statute, did not fail to obtain protection from the courts of *equity*; for it was evident, that the person directed to hold to the use was never intended by the parties to have any beneficial interest, and that his capacity was merely fiduciary (*x*). Therefore the Court of Chancery determined, that though the purposes pointed out were not uses executable by the statute, yet a *trust* subsisted in the person directed to perform the purpose; and that such trust was binding, if not at law, yet in equity; and accordingly, the interests in question, though rejected at law as *uses*, became established in equity as *trusts* (*y*). A similar protection was also given in equity to all those confidences which imposed *active* duties on the trustee; and these seem always to have been described as *trusts*, or special trusts, and never to have received the appellation of uses (*z*); and they were obviously of a very different nature from the uses aimed at by the Statute of Uses.

It is evident, that if it is intended to give C. a trust (or

(*t*) Bro. Feoff. al Uses, 52; *Browne* v. *Ramsdon*, 8 Taunt. 564; *Doe* v. *Scott*, 4 Bing. 507.

(*u*) *Barker* v. *Greenwood*, 4 Mee. & W. 429; *Williams* v. *Waters*, 14 Mee. & W. 166.

(*x*) 2 Bl. Com. 336.

(*y*) *Ibid.*

(*z*) Bac. Read. Uses, 805.

[equitable) estate, and not a legal one, it will not suffice to convey by feoffment to B. and his heirs "to the use of," or even "in trust for," C. and his heirs,—for that use or trust would be executed by the statute, and the legal estate would vest in C. ; but to accomplish the intention, it is necessary to convey by feoffment to "A. and his heirs "to the use of B. and his heirs, in trust for (or to the use "of) C. and his heirs,"—for there being in this latter case a use upon a use, the first use only will be executed by the statute, and the second use will be the trust estate. The intention may also be accomplished by enfeoffing "A. and "his heirs to the use of A. and his heirs, in trust for C. and "his heirs" ; for though the first use is not such a use as the statute executes (the seisin and the use being vested in the *same* person), yet there cannot be a use upon a use, whether the statute executes the first use or not ; and therefore the interest of C. is not a use executed, but a trust (*a*). In like manner, if an existing term for 1000 years be assigned "to A. to the use of C. and his heirs" ; here A. not being seised, but possessed only, to the use of C., the statute will not execute the use, and A. remains trustee for C. ; and as regards personal estate generally, that was never considered capable of being held to a *use*, in the proper meaning of that term (*b*) ; and the Statute of Uses is inapplicable to it (*c*)].

The courts of equity having thus acquired jurisdiction in the matter of trust estates in lands, it is convenient to now consider in somewhat greater detail, the nature of the estate of the trustee, and the nature of the estate of the *cestui que trust*.

Firstly, the word "trust" itself has varied somewhat from its antient meaning, in which it was synonymous with use, and now denotes a confidence reposed by one man in another with respect to property committed to him

(*a*) *Doe* d. *Lloyd* v. *Passingham*, 6 Barn. & Cress. 305.

(*b*) Gilb. Uses, by Sugd. 485 ; 1 Sand. Uses, p. 70.

(*c*) 1 Sand. Uses, 10 ; *The Queen* v. *Abrahams*, 4 Q. B. 159.

as the nominal owner, the term *trust*, as well as *trust estate*, being applied to express the beneficial interest of the *cestui que trust*, as well as the confidence reposed in the trustee.

Secondly, trusts are frequently distinguished as *executory* or *executed*,—being executory, where the *cestui que trust* is to take through the medium of a future instrument of conveyance which the trustee is directed to execute for the purpose ; and being executed, where no such future conveyance is contemplated, but the trust estate is completely limited in the first instance (*d*).

Thirdly, trusts may be either *express* or *implied* ; and if, *e.g.*, the legal estate in land be conveyed to A. upon such trusts as the grantor shall afterwards appoint, it is clear that A. not being intended to hold the land for his own benefit, there arises, by necessary implication, until the appointment be made, a trust for the grantor (*e*) : and such trusts, so raised by implication for the benefit of the grantor himself, are called *resulting* trusts (*f*). So if an estate be purchased in the name of one person, and the consideration-money is paid by another, the land purchased will be subject to a trust for the person by whom the money was paid (*g*) ; also, an agreement for the sale of land, when once concluded, will make the vendor a trustee in equity for the purchaser (*h*).

Fourthly, though neither the crown nor a corporation aggregate could be seised to any use but their own, the case was otherwise with respect to a trust (*i*) ; and it may be laid down generally, that every description of person capable of holding land, is capable also of being a trustee. It is also a maxim in equity, that a trust shall never fail on account of the disability of the person appointed to

(*d*) 1 Fonbl. Treat. Eq. 441, n. ; Bac. Abr. Uses, A. ; Butl. Fearne, 90, 118, 139, &c., 9th ed.

(*e*) 1 Cruise, Dig. 477.

(*f*) *Sayre* v. *Hughes*, Law Rep. 5 Eq. Ca. 376.

(*g*) 1 Sand. Uses, p. 212.

(*h*) Sugd. Vend. 154, 5th ed. and see *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.

(*i*) 1 Sand. Uses, p. 227.

perform it, or even from the omission to appoint any trustee at all,—for the court will in either case compel the execution of the trust (*k*).

Fifthly, regarding the estate of the trustee:—that estate is subject at *law* to all the incidents which attend an ordinary ownership of land. It devolves, therefore, when he dies, to his legal representative; and is liable, while he lives, to alienation by himself; but the claim of the representative, and in general also of the alienee, is subject, in contemplation of equity, to the original trust (*l*). And with regard to alienees, the same rule is established as formerly with respect to uses, that a person who becomes alienee by purchase, for valuable consideration, and without notice of the trust, is not affected by the trust, or compellable in equity to its observance (*m*),—*scil.*, because his claim is not inferior, in point of natural justice, to that of the *cestui que trust*, and equity will not interpose between them; the consequence of which is, that the legal title of the purchaser takes effect for his own benefit, while the *cestui que trust* is left to his remedy against the alienor personally, for his breach of trust. On the other hand, where the legal estate still remains in the trustee or legal representative, but the purposes of the trust are satisfied, he is always compellable to divest himself of the legal estate by executing a proper conveyance to or in favour of the person beneficially entitled. Also, under the provisions in this behalf contained in the Trustee Act, 1893 (*n*), repealing (but re-enacting with simplifications and other amendments) the like provisions contained in the Trustee Acts, 1850 and 1852 (*o*), in all or any of the following cases, that is to say:—When the High Court appoints or has appointed a new trustee; or where a trustee entitled to or possessed of any land either solely or jointly with any other

(*k*) 1 Sand. Uses, p. 226.
(*l*) Gilb. Sugd. 13, n. (5).
(*m*) 1 Sand. Uses, p. 228.
(*n*) 56 & 57 Vict. c. 53.
(*o*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

person is an infant, or is out of the jurisdiction of the High Court, or cannot be found ; or where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land ; or where as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead ; or where there is no heir or personal representative to a trustee who was entitled to or possessed of land and who has died intestate as to that land ; or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land, and is dead ; or where a trustee jointly or solely entitled to or possessed of any land has been required, by or on behalf of a person entitled to require a conveyance of the land, to convey the land and has wilfully refused or neglected to convey the land for twenty-eight days after the date of requirement,—the High Court may make an order vesting the land in any such person as the Court may direct (*p*) ; or the Court may appoint some person to execute the necessary conveyance in lieu of the trustee or his representative (*q*).

It is further to be noticed that, at *law*, the estate of the trustee was liable to be taken in execution for his debts (*r*) ; and his wife was entitled to dower (*s*) ; and the husband of a female trustee was entitled to curtesy (*t*),—but in equity, the estate of the *cestui que trust* would have been protected against all these inconveniences resulting from the trustee having the estate at law ; and although the estate of the trustee was formerly liable also to forfeiture and to escheat (*u*), that has been altered by the 13 & 14 Vict. c. 60, ss. 46, 47, providing that no land, stock, or chose in action, held in trust or by way of mortgage, shall escheat or be forfeited so as to affect the interest of the *cestui que trust* or

(*p*) 56 & 57 Vict. c. 53, s. 26.
(*q*) *Ibid.* s. 33.
(*r*) 1 Sand. Uses, pp. 220, 231 ; 1 P. Wms. 278.
(*s*) 2 Ves. sen. 634.
(*t*) 7 Vin. Ab. 159.
(*u*) 1 Sand. Uses, p. 230.

mortgagor; and by the Trustee Act, 1893, s. 25, continuing the like provision contained in the 15 & 16 Vict. c. 55, s. 6, a new trustee may be appointed in the place of any trustee convicted of felony (*x*).

Sixthly, regarding the estate of the *cestui que trust*:—That estate was not originally the subject of protection at all at law, but subsisted only in contemplation of equity (*y*) and in contemplation of equity, it was the actual beneficial *ownership*, the *cestui que trust's* estate being modelled, in general, upon the rules of the common law with regard to legal estates, for *æquitas sequitur legem* (*z*). Thus, there may be an equitable estate (just as there may be a legal estate) for life or for years, or in fee or in tail; and in the case of an equitable estate tail, the method of barring the entail is the same as if the estate were legal. So, an equitable interest may be either in possession or in expectancy, as in the case of a legal estate; but where the equitable estate in expectancy is in the nature of a *contingent remainder*, it was never subject (and is not subject) to the common law rule whereby it was defeated in the event of the determination, before the contingency happened, of the particular estate upon which it depended (*a*). The doctrine of "merger" also seems to apply to equitable as well as to legal estates,—providing the coalescing estates be both of the equitable description, and the merger will not be productive of any injustice or inconvenience (*b*). So, the same rules of construction will in general apply to equitable as to legal estates; and particularly the rule in Shelley's case (*c*). A trust of inheritance is also subject to the curtesy of the husband of *cestui que trust*, equally as

(*x*) The provision extends also to the case of a trustee becoming a bankrupt; but the like provision had been already made by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 147.

(*y*) *Britton* v. *Britton*, 4 Tyrw. 473; *Roe* v. *Read*, 8 T. R. 118.

(*z*) 2 Bl. Com. 330.

(*a*) 1 Prest. Est. 241; *Hopkins* v. *Hopkins*, Cas. temp. Talb. 44; 1 Atk. 590; *Astley* v. *Micklethwait*, 15 Ch. Div. 59; *Abbiss* v. *Burney*, 17 Ch. Div. 211.

(*b*) *Phillips* v. *Phillips*, 1 P. Wms. 41.

(*c*) Fearne, by Butl. 124, 9th ed.; *Bale* v. *Coleman*, 1 P. Wms. 142.

if it were an estate at law (*d*) ; but until a comparatively recent period, it was not subject to dower,—a peculiar anomaly (*e*), which has now been swept away by the Dower Act, 1834 (3 & 4 Will. IV. c. 105), s. 2. Again, a trust estate, though formerly protected like a use from execution for debt, is now (with more regard to justice) made subject to such execution ; for, by the Statute of Frauds (29 Car. II. c. 3), s. 10, it was made liable to the extent of one-half, and by 1 & 2 Vict. c. 110, it has been made liable to the extent of the entirety, to be taken in execution on a judgment.

But a trust estate may also be subjected, like a use, to limitations unknown to the common law ; and it has always been capable of being created or assigned (even for an estate of freehold), by deed without livery, or by last will and testament ; and originally even by parol,—although now, by the Statute of Frauds, all trusts and confidences of lands, tenements or hereditaments, except such as arise by implication or construction of law, must be manifested and proved by some writing signed by the party, or by his last will in writing (*f*) ; and the same statute prescribes writing for the grant or assignment of a trust estate (*g*).

The estate of the *cestui que trust* was never subject to forfeiture, unless for treason (*h*) ; and it did not escheat to the crown for want of inheritable blood,—for the defect of an heir conferred no title on the crown, but merely enabled the trustee to hold the land discharged of the trust and for his own benefit (*i*) ; and when the lands were held of a mesne lord, the rule was the same,—for neither on the attainder of the *cestui que trust* (unless for treason) (*k*),

(*d*) 1 Sand. Uses, p. 205.

(*e*) 2 Bl. Com. 337.

(*f*) 29 Car. 2, c. 3, ss. 7, 8.

(*g*) 29 Car. 2, c. 3, s. 9 ; *Harris* v. *Pugh*, 4 Bing. 335 ; *Scott* v. *Scholey*, 8 East, 467.

(*h*) 1 Sand. Uses, pp. 206, 207 ; Hob. 214 ; *Attorney-General* v. *Sands*, Hard. 490 ; 33 Hen. 8, c. 20 ; 13 & 14 Vict. c. 60, ss. 46, 47.

(*i*) 2 Bl. Com. 337 ; *Burgess* v. *Wheate*, 1 W. Bl. 123 ; 1 Eden, 177.

(*k*) 1 Sand. Uses, p. 288 ; 1 Hale, P. C. 249.

nor on the failure of his heirs (*l*), did the estate of the *cestui que trust* escheat to the lord, but the trustee took it for his own benefit. However, now, by the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), upon the death intestate of the *cestui que trust* without heirs, the lands shall not remain beneficially to the trustee, but shall escheat to the crown (*m*), like as the legal estate would have done,—an enactment which, *semble*, applies to mesne lords as well as to the crown as lord paramount.

And before concluding this chapter, it will be useful to here summarize certain modern statutory provisions regarding the devolution of trust estates, meaning thereby the legal estate which is vested in the trustees or trustee. And firstly, under the Vendors and Purchasers Act 1874 (*n*), by sect. 5, as amended by sect. 48 of the Land Transfer Act, 1875 (*o*), upon the death of a *bare trustee* (*p*), *intestate*, his fee simple trust estates descended into his legal personal representative,—a provision which has now been superseded and also repealed by the Conveyancing Act, 1881, s. 30, to be presently mentioned; and by sect. 6, now replaced by the Trustee Act, 1893, s. 16, when the *bare trustee* is a married woman, she is enabled to convey her fee simple trust estates as if she were a *feme sole*,—a provision which (by the Married Women's Property Act, 1882) (*q*) might well have been extended,—but has not been extended (*r*),—to trust estates generally, when the married woman is the trustee. Secondly, under the Conveyancing Act, 1881 (*s*), s. 30, upon the death, subsequently to the 31st December, 1881, of a sole trustee or of a last surviving trustee, his fee simple trust estates (being in lands of freehold tenure only, and not in lands of copyhold or customary freehold tenure) (*t*) now descend,

(*l*) *Gallard* v. *Hawkins*, 27 Ch. Div. 298.

(*m*) *Attorney-General* v. *Anderson*, [1896] 2 Ch. 596.

(*n*) 37 & 38 Vict. c. 78.

(*o*) 38 & 39 Vict. c. 87.

(*p*) *Morgan* v. *Swansea U. S. A.*, 9 Ch. D. 582.

(*q*) 45 & 46 Vict. c. 75.

(*r*) *Re Harkness and Allsopp*, [1896] 2 Ch. 358.

(*s*) 44 & 45 Vict. c. 41.

(*t*) 57 & 58 Vict. c. 46, s. 88, replacing 50 & 51 Vict. c. 73 s. 45.

whether he die testate or intestate as regards these estates, into his legal personal representative or representatives, and such representative or representatives are thereby declared to be his heirs and assigns within the meaning of all trusts and powers ; but as regards his lands of copyhold tenure, the old law as it existed prior to the 31st December, 1881, appears to be again in force (*u*).

And it is convenient also to here refer to the provision contained in the Land Transfer Act, 1897 (*x*), whereby (by sect. 1) real estate (other than real estate which survives) on the death of the beneficial fee simple owner thereof now vests like a chattel real in his legal personal representative,—and that, whether such owner die testate or intestate,—provided only he have died after the 1st January, 1898 ; and a legal personal representative may, if necessary, be appointed of such real estate alone ; but (by sect. 2) the legal personal representative is, in such cases, only a trustee for the beneficial devisee or (as the case may be) for the heir-at-law of the deceased owner,—and all the rules relative to the liability of the assets of the deceased for the payment of his debts remain unaffected ; and, apparently, the legal personal representative may, for any purpose of administration, *sell* the real estate (sect. 2 (2)),—and so save the necessity for an administrative action ; and (by sect. 3) he may assent to the title of the devisee, and may convey over the real estate to such devisee or (as the case may be) to the heir ; and (by sect. 4) may, first giving due notice of his intention in that behalf, appropriate any real estate to any legatee (pecuniary or residuary),—but only with the consent of such legatee,—in or towards satisfaction of his legacy (or share of residue), and may convey the real estate so appropriated to the appropriatee thereof.

(*u*) *In re Mill's Trust*, 40 Ch. D. 14. (*x*) 60 & 61 Vict. c. 65.

CHAPTER X.

OF TITLE IN GENERAL.

HAVING said thus much of the tenures by which lands are held, and of the estates that may be had in them, we proceed now to consider the *title* to lands, or the manner of acquiring and losing estates therein,—a consideration which will extend to equitable as well as to legal estates, but will be principally concerned with the latter ; for equitable estates (as we have just seen) are capable of being created or transferred by much simpler methods than those in use at the common law, although conveyances of the same kind are, indeed, commonly used ; and the rules of *descent* also are the same in both legal and equitable estates (*y*).

[In treating of the manner in which estates may be acquired and lost, we shall not have occasion to detach the consideration of loss from that of acquisition, for they are reciprocal ideas ; by whatever method one man gains an estate, by that same method, or its correlative, some other man at the same time losing it. For where the heir acquires by descent, or the devisee by will, the ancestor or testator has first lost or abandoned his estate by death ; where the lord gains land by escheat, the estate of the tenant is first of all lost by the extinction of his hereditary blood ; where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession.]

The acquisition of an estate in land is sometimes said to be either by *descent* or by *purchase* ; and at other times the

(*y*) *Goodright* v. *Wells*, Doug. 771.

acquisition is said to be either by *act of law* or by *act of the party* (*z*).

Title *by act of law* expresses all those modes of acquisition, where the law itself casts the right to the estate upon the acquirer, independently of any act or interference of his own, or of any other person for that purpose. Of these the principal kind is title by *descent* ; but the term will also properly include title by *escheat*, and also that of tenant by the *curtesy*, and of tenant in *dower* (*a*).

Purchase, on the other hand, though in its vulgar and confined acceptation it is applied only to such acquisitions of land as are obtained by buying it for money or some other valuable consideration (*b*) ; yet it properly includes every lawful mode of coming to an estate *by the act of the party*, as opposed to the act of law (*c*) : among which, our attention will chiefly be directed to the title by *occupancy*, by *forfeiture*, and by *voluntary transfer*,—which last is usually described as that by *alienation* or *conveyance*.

This use of the term *purchase* (*perquisitio*), by which it is distinguished from title by mere act of law, and more particularly from descent, corresponds with that of *conquest* in use among the feudists (*d*), and in the law of Scotland (*e*) ; [and the first purchaser (or he who first brought the estate into the family which at present owns it) was styled, among the Norman jurists, the *conquereur* (*f*) ; wherefore, also, William the Norman is called William the Conqueror,—signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived].

(*z*) Co. Litt. 18 b, n. (2), by Hargrave.
(*a*) Co. Litt. 18 b.
(*b*) 2 Bl. Com. 241.
(*c*) Co. Litt. 18 b.
(*d*) Craig, l. 1, t. 10, s. 13.
(*e*) Dalrymple on Feuds, 10.
(*f*) Gr. Coustum. Gloss, ch. 25.

CHAPTER XI.

OF TITLE BY DESCENT.

In considering acquisition by *descent*, we must consider the nature of such descent, and the rules by which it is governed (*g*); and we shall pass over descents by particular custom, such as gavelkind and borough-English, and confine ourselves (in the first place at least) to the subject of descent in fee simple, according to the ordinary universal law.

[And firstly, with regard to the *nature* of the heir's title, no inheritance can vest, nor can any person be the heir of another, till that other is dead,—for *nemo est hæres viventis*; and until such death, he can be at the most but an heir *apparent* or heir *presumptive*. An heir apparent is one whose right of inheritance is indefeasible, provided he outlives the ancestor,—*e.g.*, the eldest son, who must by the course of the common law be heir to the father whenever the latter happens to die. An heir presumptive is one who, if the ancestor should die immediately, would be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born before the death,—as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew, or daughter,—in the two former cases, the estate shall be divested and taken away by the birth of a posthumous child; and in the latter case, it shall also be totally divested by the birth of a posthumous son (*h*).]

(*g*) Co. Litt. 237 a—250 a. (*h*) 2 Bl. Com. 208.

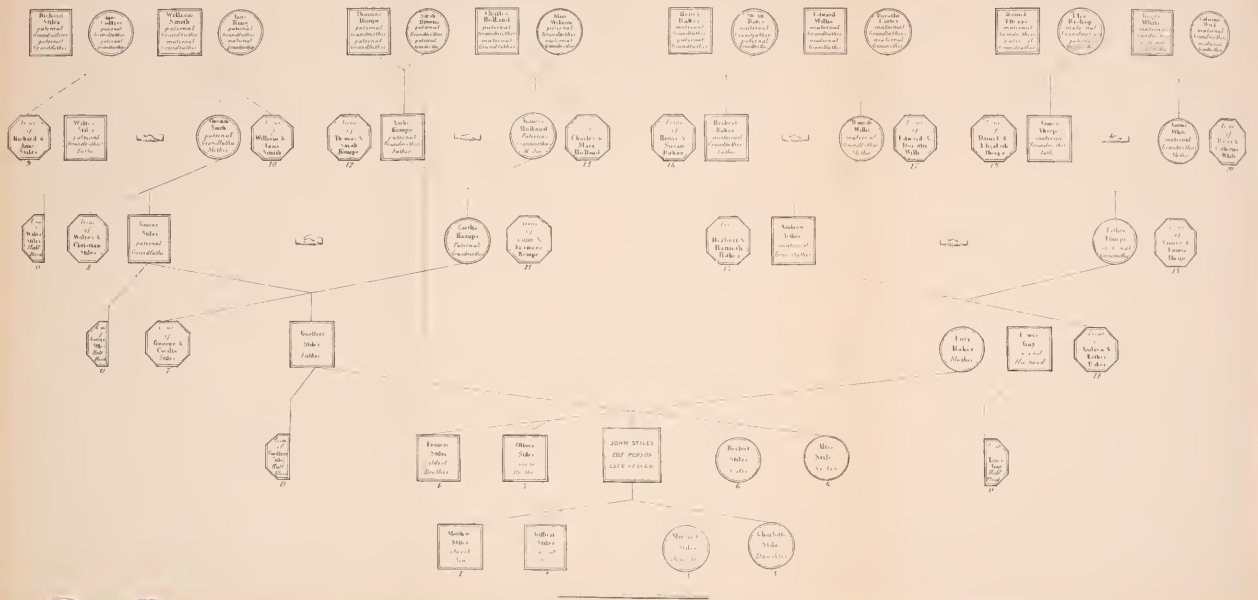
TABLE OF DESCENT.

Applying to a death occurring prior to 1st January 1834

See Commentaries on the Laws of England Vol 1 Page 219

Paternal Line

Maternal Line



London: Printed for Messrs Butterworth & Co Law Publishers 7 Fleet Street London

The law of descents is founded for the most part on the custom of the realm ; being in point of antiquity referable (as regards some of its rules) to a period at least as early as the reign of Henry the Second ; and having attained to a comparatively mature development as early as the reign of Henry the Third, or at the latest that of Edward the First (*i*) ; after which it underwent no change for the space of more than five hundred years, that is to say, until the year 1833, when it was amended in some material respects by the Act of 3 & 4 Will. IV. c. 106, passed "for the amendment of the law of inheritance."

The rules of descent which were applicable to the case of persons dying before the first day of January, 1834,—rules which are still of occasional importance in the practice of the law,—will be found stated in the foot-note (*k*) ; but we need concern ourselves in the text with only those rules, or (as they are sometimes called) canons, of descent which are

(*i*) Hale's Hist. C. L. ch. 11 ; Hist. Eng. Law, by Reeves, vol. i. p. 311 ; vol. ii. pp. 246, 317.

(*k*) For these old rules, we must refer to the system of Blackstone, according to which the annexed Table of Descent (No. I.) is arranged, and of which the Rules (or Canons) are as follows :—

Rule 1. That inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*, but shall never lineally ascend.

Rule 2. That the male issue shall be admitted before the female.

Rule 3. That when there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.

Rule 4. That the lineal descendants *in infinitum* of any person deceased shall represent their ancestors ; that is, shall stand in the same place as the person himself would have done had he been living.

Rule 5. That, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, *being of the blood of the first purchaser*, subject to the three last preceding rules.

Rule 6. That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Rule 7. That in collateral inheritances, the male stock shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from a female.

applicable to descents (by far the most numerous class of cases) taking place on a death on or after 1st January, 1834, and which rules or canons (being the rules or canons applicable to the devolution of the *beneficial* title or estate) are as follows :—

I. In every case the descent shall be traced from the *purchaser* ; and the Inheritance Act (3 & 4 Will. IV. c. 106, s. 1), itself defines "*the purchaser*" as meaning and denoting "the person who last acquired the land *otherwise than by descent*" (*l*). Wherefore, if the deceased owner of an estate in fee simple came to it by purchase, that is, in any other manner than by descent, the party claiming it as heir must make *him* the *propositus*, or person from whom consanguinity is to be traced ; while if he came to it by descent from some purchasing ancestor, *that ancestor* must be made the *propositus*. Thus, if John Stiles, in the annexed Table of Descent (No. II.), die the owner of an estate which he acquired by purchase, any person claiming that estate as heir must prove that he is heir to John Stiles ; but if John die owner of an estate which descended to him from Geoffrey his father by whom it was originally purchased, the claimant must prove that he is heir to Geoffrey the father, Geoffrey becoming in that case the *propositus* instead of John, and the effect being, that (in the first instance, at least) no relation of John *ex parte maternâ* can, as such, inherit. But if the estate descended to John from Lucy Baker, his mother, and she (Lucy) was the purchaser, the descent must in that case be traced from *her*, and John's relations *ex parte paternâ* are (at least in the first instance) necessarily excluded. And inasmuch as it often happens, especially in long descents,

(*l*) 3 & 4 Will. 4, c. 106, s. 1. The Act says—"Otherwise than "by descent, or than by any "*escheat*, *partition*, or *inclosure* "by the effect of which the land "shall have become part of or "descendible in the same manner "as other land aequired by "descent."

Maternal Line

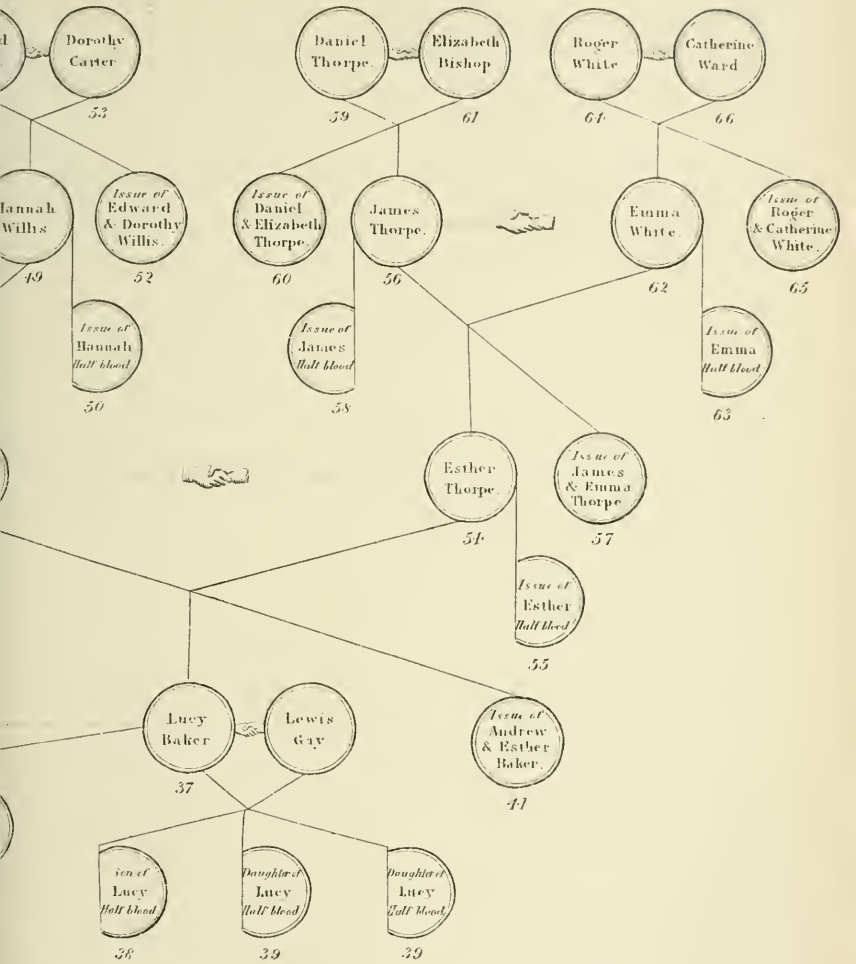
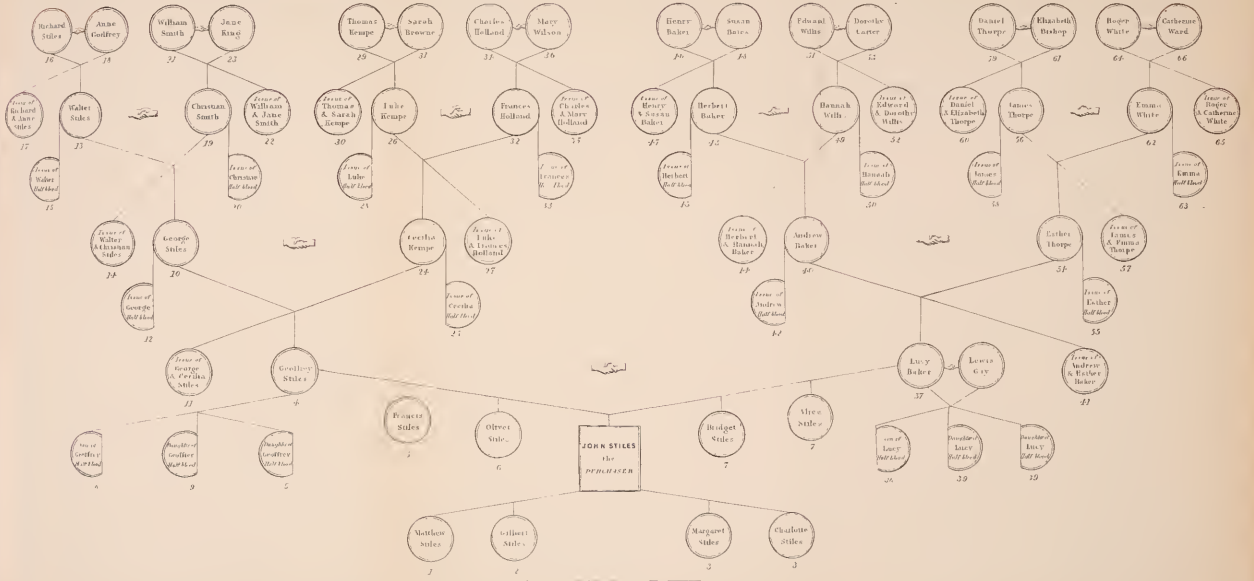


TABLE OF DESCENT.

under 3 & 4 W. 4 C. 106 upon deaths on & after 1 January 1834

Paternal Line

Maternal Line



London: Printed for Alfred Butterworth & C.o Law Publishers, 7, Fleet Street, London.

that it is uncertain by whom an estate was originally purchased, therefore the Inheritance Act provides against this difficulty of proof, by the following rule of *evidence*, which is to be understood as a necessary supplement to the rule of descent under consideration, viz., that the last owner, or person "last entitled to the land" (*m*), shall be considered to have been the purchaser, *unless it shall be proved that he inherited it*; and the same rule is to be constantly applied at every step upwards of the pedigree (*n*). Therefore if John Stiles is the person last entitled to an estate, and dies, and it does not appear whether he purchased it or not, the claimant must prove descent from *him*.

This 1st canon is mainly founded on the antient maxim, that *none shall claim as heir who is not of the blood of the purchaser* (*o*),—[a maxim which cannot otherwise be accounted for than by recurring to feudal principles (*p*). For when feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be lineally descended from the first feudatory or purchaser (*q*); and if therefore a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring, —not even to his brother,—because he was not descended, nor derived his blood, from the first acquirer; but if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then (on failure of his own descendants) his brother, or such other collateral relation as was

(*m*) The expression "the person "*last entitled*," extends "to the "last person who had a right thereto" (*scil.*, to the land), "whether he did or did not obtain "the possession, or the receipt of "the rents and profits thereof" (3 & 4 Will. 4, c. 106, s. 1); and the word "land" extends to all hereditaments, whether corporeal or incorporeal, of whatever tenure, and whether in possession, reversion, or remainder, &c. (3 & 4 Will. 4, c. 106, s. 1.)

(*n*) Sect. 2.

(*o*) Co. Litt. 12 a; 2 Bl. Com. 220.

(*p*) Grand Coustum. ch. 25.

(*q*) 1 Feud. 20; *Wood* v. *Douglas*, 30 Ch. Div. 327; *Moore* v. *Simkin*, 31 Ch. D. 95.

[descended, or derived his blood, from the first feudatory, might succeed to such inheritance. The true feudal reason for which rule was this, that what was given to a man for his personal merit, ought not to descend to any but the heirs of his person ; and therefore, as now in estates tail, (which a proper feud very much resembled,) so in the feudal donation, "*nomen hæredis in primâ investiturâ expressum, tantum ad descendentes ex corpore primi vasalli extenditur, et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*" (*r*)].

Under this system, therefore, it was necessary, that a person claiming by descent on the death of the last proprietor should prove himself to be of the blood of and also lineally descended from the purchaser ; however, when the feudal rigour somewhat abated, a method was invented to let into the inheritance the collateral relations, on failure of the lineal descendants of the grantee, by granting him a *feudum novum* to hold *ut feudum antiquum* ; that is, with all the qualities annexed to a feud derived from his ancestors (*s*); and then though the lineal ancestors themselves were always excluded, for reasons which will hereafter appear, yet the collateral relations of the purchaser,—that is, the lineal descendants of those ancestors,—were admitted to succeed, even *in infinitum*, because they might have derived their blood from the first *imaginary* purchaser. [For since it was not ascertained, in such general grants, whether this feud should be held *ut feudum paternum* or *feudum avitum*, but merely that it should be held *ut feudum antiquum*, as a feud of indefinite antiquity,—that is, since it was not ascertained from which of the ancestors of the real purchaser this feud should be supposed to have descended, —the law would not ascertain it either, but would suppose any of his ancestors *pro re natâ* to have been the first purchaser ; and therefore it admitted any of his collateral kindred (who had the other necessary requisites) to the

(*r*) Craig, l. 1, tit. 9, sect. 36. (*s*) 2 Bl. Com. 221.

[inheritance,—because every collateral kinsman must be descended from some one of his lineal ancestors (*t*).

But while the old feudal requisite of a lineal descent from the true purchaser was thus substantially set aside, it continued nevertheless to be necessary that the claimant should be of the *blood* of the true purchaser,—for no person, without being related to him either lineally or collaterally, could be supposed to be lineally descended from the imaginary purchaser ; and as it was necessary that the claimant should be of his blood, so it was from him, as a root, that the descent was in some cases to be traced ; for if the estate which descended was of a kind in which the owner could not acquire actual seisin of the land (as in a reversion or remainder expectant upon a freehold, in which case the actual seisin belonged to the particular tenant), the rule was that the claimant must trace his descent from (or, as it was usually expressed, *make himself heir to*,) the purchaser (*u*). Supposing the estate descended, however, to have been of a kind in which the owner *could* acquire actual seisin, as in the case of an estate in possession, or a reversion or remainder expectant on a term of years, the rule was different ; for here another antient maxim intervened, and required *that the claimant should make himself heir to the person last actually seised of the inheritance* (*x*),—every person who obtained an actual seisin, whether he were an original purchaser, or derived his title by descent, being considered as a new root, from which all future claimants were to spring, a principle that was briefly expressed in the adage *Seisina facit stipitem* (*y*). Thus if Geoffrey Stiles, the father, died seised of land of which he was the purchaser, and which descended to John as his heir, and John died before entry, the next claimant

(*t*) *Kynnaird* v. *Leslie*, Law Rep., 1 C. P. 389.

(*u*) *Ratcliffe's Case*, 3 Rep. 42 a ; Co. Litt. 15 b, 191 b ; *Doe* v. *Hutton*, 3 Bos. & Pul. 649, 656.

(*x*) Co. Litt. 11 b ; *Ratcliffe's Case*, 3 Rep. 41 b, 42 a.

(*y*) Hale's Hist. C. L. ch 11.

[was to make himself heir to Geoffrey ; but if John entered and obtained actual seisin, it would then be necessary to claim as heir not to Geoffrey, but to John ; and the difference was material ; because the heir to the person last seised and the heir to the purchaser were not necessarily the same person. If John, for example, died leaving a half brother, his father's son, the latter might possibly, on John's decease, be next heir to Geoffrey the father ; but it was impossible, as the law then stood, that he should be heir to John, descent not then being allowed between those related by the half blood (*z*). The rule of which we speak did not make it the less necessary, indeed, that the claimant should be of the *blood* of the purchaser,—for this, in every case of descent, was universally required : but if he had that qualification, and could make himself heir to the person last seised, he was entitled to succeed, whether he could make himself heir to the purchaser or not ; while, on the other hand, his being heir to the purchaser was not sufficient, unless he was also heir to the person last seised (*a*). Thus, if John Stiles had purchased land and died, leaving no other kindred than his father's brother and his own brother of the half blood (his father's son), the uncle would have been his heir, as the brother (by the rule already noticed) could not have claimed in that character ; and if the uncle had also obtained seisin and died, without other kindred than John's half brother, the latter would then have been entitled to succeed, for he would have been heir to the person last seised, and of the blood of the purchaser, though not the heir of the purchaser (*b*). On the other hand, if John Stiles had inherited land purchased by Geoffrey, and died seised without other kindred than his half brother (his father's son), the latter could not have inherited, because unable to make himself heir to John ; and yet he would have been heir to Geoffrey.

(*z*) Co. Litt. 15 b.
(*a*) Hale's Hist. C. L. ch. 11.
(*b*) H. Chit. Desc. 115.

[It is to be observed, however, that in many cases to trace descent from the person last seised amounted in effect to the same thing as tracing descent from the purchaser,—for where the last owner happened to have been in fact the purchaser of the estate, he would also be the person last actually seised. Thus, if it were an estate in possession acquired by feoffment, this implied a real delivery to him of the actual seisin ; and supposing it to have been acquired by devise (under the Statute of Wills), or by a conveyance under the Statute of Uses (of the nature of which we shall speak hereafter), the case would be in effect the same),—for the actual seisin (so far at least as would suffice to make him the root of descent) would here be transferred to him, without entry, by mere construction of law (*c*). So if his estate were a reversion or remainder in fee expectant on a term of years, he would be clothed with an actual seisin of the fee, through the medium of the possession of the particular tenant. In all such cases, therefore, if the claimant made himself heir to the purchaser, he would also make himself heir to the person last actually seised ; and so would satisfy both the conditions required to make out a descent in fee simple.]

The new rule of descent discards (in effect) the antient maxim *Seisina facit stipitem*, and establishes that descent shall be traced from the purchaser,—a rule simple and uniform, and at the same time easy and certain in its application ; while, under the old maxim it was sometimes difficult to determine what would amount to a seisin sufficient to constitute a *stipes* ; and it was highly unsatisfactory besides, that the right to the succession should in any case depend on so unimportant a circumstance as the omission of the owner to make entry before his death, on the land he had acquired by inheritance (*d*).

Before we dismiss this first rule or canon of descent, it

(*c*) *R.* v. *Sutton*, 3 A. & E. 611 ; Watk. Desc. ch. 1, s. 6 ; Co. Litt. 111 a, 266 b.

(*d*) See Lord St. Leonards on Real Property Statutes, p. 282.

is necessary to remark, that where a man devised land to his heir for an estate of precisely the same quality that he would have taken by descent, it was the rule of the common law that the descent would take effect, and not the devise,—*scil.*, because the descent was the elder and preferable (as being the more feudal) title (*e*). The contrary rule, however, is now established by the Inheritance Act (sect. 3), which says,—that "when any land shall "have been devised by any testator who shall die after "31st December, 1833, to the heir, or to the person who "shall be the heir of such testator, such heir shall be "considered to have acquired the land as a devisee, and "not by descent" (*f*); and accordingly such heir will now be the *purchaser* within the definition of "purchaser" in the Act. Again, where land was limited by any assurance to the grantor or feoffor, or to his heirs, or to the right heirs of the testator, the rule of the common law was that such grantor, feoffor, or testator acquired nothing by such assurance, but was entitled as of his former estate (*g*); but it has now been provided by the Inheritance Act (sect. 3), that "when any land shall have been limited by "any assurance executed after the 31st of December, "1833, to the person or to the heirs of the person who "shall thereby have conveyed the same land, such person "shall be considered to have acquired the same as a "purchaser by virtue of such assurance, and shall not be "considered to be entitled thereto as of his former estate "or part thereof."

II. The second rule or canon of descent is, that inheritances shall in the first place lineally descend to the issue of the purchaser *in infinitum*; and this principle of placing the lineal descendants first in succession to

(*e*) 2 Bl. Com. 242; 1 Roll. Abr. 626; *Doe* v. *Timins*, 1 Barn. & Ald. 530.

(*f*) *Bickley* v. *Bickley*, Law Rep., 4 Eq. 216; *Wood* v. *Douglas*, 30 Ch. Div. 327.

(*g*) Co. Litt. 22.

their ancestor is, under all systems of descent, invariably adopted, and may be said to be of universal obligation or propriety ; for the possessions of the parents naturally go, upon their decease, in the first place to their offspring, as those to whom they have given being, and for whom they are therefore bound to provide (*h*).

III. The third rule or canon of descent is, that the children of the purchaser are preferred to the grandchildren or remoter issue ; that males are preferred to females ; and that an elder male is preferred to a younger, but that females take together.

[The preference of males to females is most probably attributable to the imperfect system of feuds which obtained here before the Conquest, especially as the same preference exists in gavelkind ; and we find that in the laws of King Henry the first, it is plainly recognized (*i*), and the rather as it consisted with the policy of the feudal law, according to which females could never succeed to a proper feud, being incapable of performing those military services for the sake of which that system was established (*k*). Nevertheless, our law does not extend to the total exclusion of the female, as the Salic law does ; but it only postpones them to males ; for though daughters are excluded by sons, yet they succeed where there is no son : our law thus steering a middle course between the actual rejection of females and the putting them on a level with males.

Primogeniture in males appears to have obtained to some extent among the Jews (*l*) ; and with us, by the laws of King Henry the First, the eldest son had the capital fee or principal feud of his father (*m*) ; and afterwards the eldest daughter (in the case of female heirs) had the principal mansion (*n*) ; but the practice rather was, among all nations originally, to divide the lands equally,—a practice

(*h*) 2 Bl. Com. 210.
(*i*) Leg. Hen. 1, c. 70.
(*k*) 1 Feud. 8.
(*l*) Selden de Succ. Ebr. ch. 5.
(*m*) Leg. Hen. 1, c. 70.
(*n*) Glanv. l. 7, ch. 3.

[which had the appearance at least of justice. But when honorary feuds or titles of nobility began to be created, it was found necessary to make them impartible, that is to say, *feuda individua*, and descendible to the eldest son alone (*o*); and in this condition the feudal constitution was established in England by William the Conqueror. Yet we find that socage estates frequently descended to all the sons equally, so late as when Glanville wrote, in the reign of Henry the Second (*p*); and it is mentioned in the Mirrour, as a part of our antient constitution, that knight's fees should descend to the eldest son, and socage fees should be partible among the male children (*q*). However, in Henry the Third's time, we find from Bracton, that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands (*r*),—except, indeed, in Kent, where the gavelkind tenure prevailed, of which a principal branch was the joint inheritance of all the sons (*s*). And even among females, although primogeniture has never prevailed among them, still it does prevail where, as in the succession to the Crown, there is the necessity of a sole and determinate succession (*t*); and the right of sole succession, though not strictly of primogenture, is also established with respect to female dignities and titles of honour. For if a man hold an earldom to him and the heirs of his body, and die leaving only daughters, the eldest daughter shall not, as a matter of course, be countess, but the dignity is in suspense or abeyance, till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of the daughters he pleases (*u*).]

IV. The fourth rule or canon of descent is, that the issue *in infinitum* of the children of the purchaser *represent*

(*o*) 2 Feud. 55.
(*p*) Glanv. l. 7, ch. 3.
(*q*) Mirrour, ch. i. s. 3.
(*r*) Bract. lib. ii. cc. 30, 31.
(*s*) Somner, Gavelkind, 7.
(*t*) Co. Litt. 165 a.
(*u*) *Ibid.*

(or take the place of) their deceased parents, subject always to the third rule or canon having full operation among them.

[Thus, the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son ; and these representatives shall take neither more nor less than, but just so much as, their principals would have done (*x*). As if there be two sisters, Margaret and Charlotte, and Margaret dies, leaving six daughters ; and then John Stiles, the father of the two sisters, dies without other issue ; these six daughters shall take among them exactly the same as their mother Margaret would have done had she been living,—that is, a moiety of the land of John Stiles, in coparcenary ; so that upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, shall have one a-piece (*y*).

This taking by representation is sometimes called succession *per stirpes*, all the branches inheriting the same share that their root (*stirps*), whom they represent, would have done. And by dividing the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady ; and among the several issues or representatives of the respective roots, the same preference of males to females and the same right of primogeniture in males obtain, as would have obtained at the first among the roots themselves—the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies,—the eldest son of A. shall succeed to the whole of his grandfather's estate ; and if a man hath only three daughters, C., D., and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son,—the eldest son of C. shall succeed to one-third ; the two daughters of D. to another third ; and the son of E. to the

(*x*) Hale's Hist. C. L. ch. 11.

(*y*) *Cooper* v. *France*, 19 L. J. Ch. 313 ; *James* v. *Dickinson*, [1897] 2 Ch. 509.

[remaining third. The right of representation does not appear to have been fully established in the time of Henry the Second, when Glanville wrote ; and, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the deceased elder brother) ; but by the time of King Henry the Third, the right of representation was indisputably settled (*z*).]

V. The fifth rule or canon of descent is, that on failure of the issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor then living in the preferable line,—always supposing, of course, that there is no issue of a nearer deceased ancestor in that line.

This descent to the lineal ancestor, although it appears to have prevailed among the Anglo-Saxons (*a*), has been only recently introduced into our law, [for it was an express rule of the feudal law, that "*successionis feudi talis est natura quod ascendentes non succedunt*" (*b*) ; and so early as Glanville's time we find it laid down as an established law, that *hæreditas nunquam ascendit* (*c*). Nor was the feudal maxim unreasonable in itself ; for if the feud of which the son died seised was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed through the father in the course of its descent to the son,—unless indeed it were *feudum maternum*, when the father would be excluded as not deriving his blood from the purchaser ; and if the feud of which the son died seised were *feudum novum* strictly so called, or were *feudum novum* held *ut feudum antiquum*, in either case the feud would not go to the father (*d*)]. But the rule which excluded the father,

(*z*) Bract. lib. ii. ch. 30, s. 2 ; Hale's Hist. C. L. ch. 11.

(*a*) Hallam's Middle Ages, vol. ii. p. 467, 7th ed.

(*b*) 2 Feud. 50.

(*c*) Glanv. lib. 7, ch. 1.

(*d*) 2 Bl. Com. 212 ; Co. Litt. by Harg. 11 a, n. (1).

was felt, in later times, to be opposed to natural justice, which seemed to dictate that a man's progenitors should be allowed to inherit his estate, by a right second only to that of his posterity ; and such accordingly is now the law, the Inheritance Act, 3 & 4 Will. IV. c. 106, having provided, that " every lineal ancestor shall be capable of being heir " to any of his issue ; and in every case where there shall " be no issue of the purchaser, his nearest lineal ancestor " shall be his heir in preference to any person who would " have been entitled to inherit, either by tracing his descent " through such lineal ancestor or in consequence of there " being no descendant of such lineal ancestor (*e*),—so that " the father shall be preferred to a brother or sister, and a " more remote lineal ancestor to any of his issue, other than " a nearer lineal ancestor or his issue."

VI. The sixth rule or canon of descent is, that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor, male or female,) is always preferred to the maternal ; and this preference of the paternal line is founded on the express provisions of the Inheritance Act (3 & 4 Will. IV. c. 106) (sect. 7), that " none of the maternal ancestors of the person " from whom the descent is to be traced, nor any of their " descendants, shall be capable of inheriting until all his " paternal ancestors and their descendants shall have failed ; " and no female paternal ancestor of such person, nor any " of her descendants, shall be capable of inheriting until all " his male paternal ancestors and their descendants shall " have failed ; and no female maternal ancestor of such " person, nor any of her descendants, shall be capable of " inheriting until all his male maternal ancestors and their " descendants shall have failed " ; and (sect. 8), that " where there shall be a failure of male paternal ancestors

(*e*) The expression "*descendants*" extends to all persons who trace their descent through an ancestor (3 & 4 Will. 4, c. 106, s. 1) ; in other words, this fifth rule or canon is read subject always, and at every step, to the first four rules or canons.

" of the person from whom the descent is to be traced, and " their descendants, the mother of his more remote male " paternal ancestor, or her descendants, shall be the heir " or heirs of such person in preference to the mother of a " less remote male paternal ancestor, or her descendants ; " and where there shall be a failure of male maternal " ancestors of such person, and their descendants, the " mother of his more remote male maternal ancestor, and " her descendants, shall be the heir or heirs of such person " in preference to the mother of a less remote male maternal " ancestor, and her descendants."

VII. The seventh rule or canon of descent is, that where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth rule, descend, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him,—according to the same law of succession laid down with respect to the issue of the purchaser, but with this addition, that those related by the whole blood to the purchaser, are preferred to those related by the half-blood.

It is obvious from the nature of consanguinity, that, as regards the purchaser, the issue of his lineal ancestor are necessarily his *collateral* kindred ; and on the subject of collateral inheritance (which this rule or canon first introduces us to), it deserves remark, in the first place, that the right of collaterals no longer depends on the fiction of the *feudum novum ut feudum antiquum*, but on the positive enactments contained in the Inheritance Act ; and secondly, that the right of collaterals is now referable universally to that of the ancestor from whom they descend, and that it is only through him that they can ever be considered as heirs to the purchaser,—so that the old law, which held that between brothers and sisters the descent was to be considered, for some purposes, as *immediate* (*f*), is now

(*f*) 2 Bl. Com. 226 ; Watk. Desc. 111, n. ; *Kynnaird* v. *Leslie*, Law Rep., 1 C. P. 389.

exploded, the Inheritance Act having now expressly provided that no brother or sister shall be considered to inherit *immediately* from his or her brother or sister, but that every descent from a brother or sister shall be traced through the parent (*g*).

A kinsman of the whole blood, is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For every man's blood is compounded of the bloods of his respective ancestors ; and he only is of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood, that the other hath. And the Inheritance Act assigns to such of the purchaser's collateral kinsmen as are of the whole blood, and their issue, the preference to those who are of the half-blood only, in the same degree, but admits the latter to the next place in the succession (*h*). Thus, if the father have a son A., by one wife,—and two sons, B. and C., and a daughter, by a second wife,—and B. purchase land, and die without issue, and the father be also dead, C., the younger brother, or, on failure of C. and his issue, the sister, shall succeed in preference to A., the elder brother ; but A. (though only of the half-blood) and his issue, will succeed in preference to any collateral relation not descended from B.'s father, though of the whole blood with B.

In the admission of the half-blood, the Inheritance Act has introduced a new principle of inheritance ; for, as the law before stood, the half-blood (like the lineal ancestor) were totally excluded, and the land would rather have escheated to the lord than have gone to any kinsman (however near) of the half-blood. Nay, even when a father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue, still B., the son of the same father by another wife, could not have been heir to these lands, because he was only of the

(*g*) 3 & 4 Will. 4, c. 106, s. 5. (*h*) 3 & 4 Will. 4, c. 106, s. 9.

half-blood to A., the person last seised; but they would have descended to a sister (if any) of the whole blood to A., for in such cases the old maxim applied, that *possessio fratris facit sororem esse hæredem*,—although if A. had died without entry, then B. might have inherited; not as heir to A. his half-brother, but as heir to their common father, who was the person last actually seised (*i*).

The antient law excluding the half-blood operated with especial severity where the deceased tenant did not take by purchase, but by descent, and had a relative of the half-blood known to be descended (equally with himself) from the purchaser. And the severity which arose in such a case was (according to the better opinion) not originally involved in the feudal principle at all; [for the custom of excluding the half-blood extended originally only to exclude a *frater uterinus* where the inheritance descended *a patre*, and *vice versâ*; and the rule, as laid down by Fortescue, extends no further than this, *frater fratri uterino non succedet in hæreditate paternâ* (*k*). It is moreover worthy of observation, that the crown has always been held capable of descending to the half-blood of the preceding sovereign (*l*), provided he be the blood of the first monarch of the reigning family who was *conqueror* (*i.e.*, *purchaser*) of the realm; for though none can be a claimant to the crown unless known to be descended from the original stock—which was at one period King William the Norman, and is now, by Act of Parliament (12 & 13 Will. III. c. 3), the Princess Sophia of Hanover (*m*)—yet, when such descent is known, the feudal rule is satisfied, whether he be related to the last sovereign by the whole, or by the half-blood. And upon the same principle, in titles of honour (*n*) and in all estates tail (*o*), half-blood was never an impediment to the descent,—because, in these cases, the pedigree from the first donee must be strictly proved]. And now, by the

(*i*) 2 Bl. Com. 227.
(*k*) Fort. De Laud. Leg. Ang. ch. 5.
(*l*) Plowd. 245; Co. Litt. 15 b.
(*m*) 2 Bl. Com. 233.
(*n*) Co. Litt. 15.
(*o*) Litt. ss. 14, 15 b.

Inheritance Act, it has been provided (as regards fee simple inheritances generally) :—That "any person related to "the person from whom the descent is to be traced by the "half blood shall be capable of being his heir ; and the "place in which such relation by the half-blood shall stand "in the order of inheritance, so as to be entitled to inherit, "shall be next after any relation in the same degree of the "whole blood and his issue, where the common ancestor "shall be a *male* ; and next after the common ancestor, "where such common ancestor shall be a *female*,—so that "the brother of the half blood on the part of the father "shall inherit next after the sisters of the whole blood on "the part of the father and their issue ; and the brother "of the half-blood on the part of the mother shall inherit "next after the mother" (*p*).

Having now expounded all the rules or canons of descent,—and which rules are, of course, of a general applicability,—we have now to consider some few exceptional cases which require a more specific treatment.

First, then, there are cases in which a man may acquire land by purchase, under a limitation to the "heirs," or to the "heirs of the body," of one of his ancestors. Thus, if the owner of lands conveys them to A. for life, remainder to the "heirs" or "heirs of the body" of B., and B. be then deceased, or be then living but die during the continuance of the particular estate, the person who at the time of the conveyance in the first case, or at the time of B.'s death in the second, answers the description of his "heir" or "heir of his body," will, by the rule of the common law, take the remainder as purchaser, and his estate will be a fee simple or fee tail, as the case may be,—for such words amount *not only to a description of the grantee, but to a limitation of the estate* which he is to take (*q*). But the estate so acquired by purchase is

(*p*) 3 & 4 Will. 4, c. 106, s. 9.
(*q*) Co. Litt. 10 a, 319 b ; 1 Roll. Abr. 627 ; 2 Bl. Com. 241 ; 1 Prest. Est. 280, 452, 453.

anomalous as regards its descendible quality, the 4th section of the Inheritance Act having provided, that (in effect) the ancestor named in the limitation shall be deemed the purchaser,—*scil.*, for the purposes of the subsequent descent of the estate ; and this rule applies to all assurances *inter vivos* executed after the 31st December, 1833, and to all assurances by will, where the testator dies after the 31st December, 1833.

Secondly, it is provided by the 22 & 23 Vict. c. 35, s. 19, that "Where there shall be a total failure of heirs of the "purchaser (or where any land shall be descendible as if "an ancestor had been the purchaser thereof, and there "shall be a total failure of the heirs of such ancestor), then "and in every such case the land shall descend, and the "descent shall thenceforth be traced from *the person last* "*entitled to the land as if he had been the purchaser thereof.*" That is to say, the purchaser who is defined in the first rule or canon of descent as being *the last person entitled* to the land *who did not inherit* the same, is by this rule or canon defined as *the last person entitled* to the land, although he was entitled thereto by descent or as by descent ; and it is to be observed that, subject only to that one change in the *propositus*, all the preceding seven rules or canons are (in such a case) to be applied over again, for the purpose of discovering the heir ; and in this way, the widow of the purchaser proper and her family may be found to be the heir.

Having now brought our account of the present law of descent to a close, we may remark, as the result of the investigation, that, upon the death of the owner of an estate in fee simple, we are to ascertain the heir, by considering, first, who was the *purchaser* ; and we are then to look for the heir, first, among his issue,—where the heir will be his descendant next to him in blood, but subject to the principles which obtain as to sex, primogeniture, and representation : and, failing his issue, among his lineal

ancestors or their issue,—where the heir will be his lineal ancestor next in blood in the preferable line, or the issue of such ancestor, if deceased, the principle which prefers the whole to the half-blood being also at each step regarded ; and then, on the total failure of any heir of the purchaser proper, the person last entitled (although entitled himself by inheritance) is to be deemed the purchaser, and the like investigation on that basis is to be repeated through all its successive stages.

Before we conclude the chapter, it will be proper to notice some miscellaneous points of law connected with the title which is by descent.

1. In order to make the title complete, where the estate descended is one in possession, the heir is required to make *entry* on the land,—for until then, he is said to have seisin in *law* only and not in *deed* ; and it is at all events incompetent for him, before entry, to bring any action of trespass *quare clausum fregit* for injuries committed to the land (*r*). If the estate be one in expectancy, he has of course no right of entry until the particular interest determines ; but if the estate be a reversion or remainder immediately expectant on an estate for *years*, the possession of the particular tenant operates as that of the heir (remainderman or reversioner), whose seisin is in that case considered as a seisin in deed, and not in law only (*s*).

2. Where a man acquires lands by descent, the lands retain the inheritable quality which they had in the purchaser or *propositus*,—wherefore a paternal inheritance never passes over to the maternal heirs of the person last entitled ; nor will a maternal inheritance pass over to the paternal heirs of such person. And in this respect the title by descent differs remarkably from that by purchase ; for by the latter the estate acquires a new inheritable

(*r*) Bac. Ab. Trespass (C.), 7 T. R. 390 ; *Doe* v. *Whichelo*, 8 T. R. 213 ; *Leach* v. *Jay*, 9 Ch. D. 426.

(*s*) Co. Litt. 15 a ; *Doe* v. *Keen*,

quality, and is descendible to the owner's blood in general, that is, first to those of the paternal, and then to those of the maternal line. It follows, that if a person who has acquired an estate by descent conveys it to a new purchaser, the line of descent is *broken*; and even if that purchaser conveys it back again to him, the interruption still continues,—for the former owner will then hold it as by purchase, and not as by descent, and will therefore be able to transmit it to his heirs on either the paternal or the maternal side. Thus, if a man seised of lands as heir on the part of his mother (and which consequently no relation on the father's side can, as such, inherit), conveys them to another, and afterwards obtains a reconveyance of them, to hold to him and his heirs, and then dies without issue, his heirs on the part of his father shall inherit, and in preference to those on the mother's side (*t*),—that being the result of "*breaking the descent*." But a mere alteration in the quality or circumstances of an estate will not "break the descent"; and therefore, if parceners make partition of their land, they are still *in* of their respective shares by their original title of inheritance, though their shares are no longer held in coparcenary, but in severalty.

3. An estate in fee simple descending on the heir, comes to him charged with the debts of the ancestor from whom it descended (*u*). This liability has always been recognized in respect of such of the ancestor's obligations as (in legal language) have accrued by *specialty*, a term which includes an obligation accruing by "matter of record" (such as a judgment or other proceeding recorded in a court of justice) as well as an obligation arising on a deed, *i.e.*, a contract under seal; though, unless the ancestor bound his heirs *eo nomine* in and by the deed, their liability

(*t*) Co. Litt. 12 b; *Doe* v. *Morgan*, 7 T. R. 105; 1 Prest. Est. 420, 458, 459; *Wood* v. *Douglas*, 28 Ch. Div. 327; *Moore* v. *Simkin*, 31 Ch. Div. 95.

(*u*) *Bushby* v. *Dixon*, 3 Barn. & Cress. 298.

was not held to be such as could be enforced in the courts of *law* (*x*). But the heir is not liable (whatever the kind of obligation of his ancestor may have been) to be charged as of his own proper debt, but only so far as he has taken, in his character of heir, an estate sufficient to satisfy the debt ; which sufficient estate is called, in law, assets, from the French word *assez*, enough (*y*). But the assets which descend to an heir may consist either of legal or of equitable assets ; and though equitable interests were not in general noticed at law, yet in this case it was otherwise, —the Statute of Frauds (29 Car. II. c. 3), s. 10, having enacted, that if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, the trust should be assets by descent, and the heir liable to be charged with the obligation of his ancestor by reason of such assets, as if the *legal* estate had descended in possession upon him.

But though the *heir* was thus under liability for the specialty debts of his ancestor (to the extent of the estate inherited), a *devisee* was not under any such liability ; and therefore it was provided, by the 3 William and Mary, c. 14, commonly called "The Statute of Fraudulent Devises," that where a deceased person had devised any real estate, without making it subject to the payment of his debts, his *devisee* should be liable to be charged in respect of the real estate so devised, *in the same manner as, and jointly with, the heir* ; and by the 1 Will. IV. c. 47, s. 4, the creditor may sue the devisee alone, where there is no heir (*z*).

And the claims of creditors of every class have now been effectually secured through the medium of proceedings in *equity*. The remedy in equity was, at first, confined to cases where the deceased was a person carrying on trade within the meaning of the bankrupt laws, it being provided by 47 Geo. III. sess. 2, c. 74, and afterwards by

(*x*) *Harbert's Case*, 3 Rep. 12 b.
(*y*) 2 Bl. Com. 243, 244 ; 2 Saund. by Wms. 7, n. (4).
(*z*) *Hunting* v. *Sheldrake*, 9 Mee. & W. 256.

11 Geo. IV. & 1 Will. IV. c. 47 (*a*), that, in such a case, the creditors by simple contract should be entitled by proceedings in equity, to enforce payment out of the real estate descending on his heir, or devised by his will; subsequently, however, by 3 & 4 Will. IV. c. 104, it was enacted more extensively—that when *any* person should die entitled to any real estate, *not by his will made subject to his debts*, such estate should be considered as assets to be administered in a court of equity, for payment of his debts as well on simple contract as on specialty, the Act still giving priority to those of the creditors who in their lifetime had placed their claims upon a basis of stronger obligation,—for it provided, that, in the administration of the assets in equity, all creditors by specialty in which the heirs *eo nomine* were bound, should be paid in full before any creditors by simple contract, or claiming on specialties in which the heirs *eo nomine* were not bound. And by Hinde Palmer's Act (32 & 33 Vict. c. 46), in the administration of the estate of any person who shall die on or after 1st January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by an instrument under seal, or is otherwise made a specialty debt; but all his creditors, as well specialty as simple contract, shall be treated as standing in equal degree; but, of course, the Act does not prejudice any lien, charge, or other security which the creditor may hold for his debt (*b*). And by the Judicature Act, 1875 (*c*), s. 10, as from the 2nd November, 1875, in the administration of the estates of deceased insolvents, the like rules shall prevail as in bankruptcy, as regards the mode of proof by secured and unsecured creditors, and as to the classes of debts and kinds of liability that are provable, and as to the valuation of

(*a*) *Small* v. *Hedgeley*, 34 Ch. Div. 379.

(*b*) *Williams* v. *Williams*, Law Rep., 15 Eq. Ca. 270; *Shirreff* v. *Hastings*, 6 Ch. D. 610.

(*c*) 38 & 39 Vict. c. 77.

annuities and contingent liabilities (*d*),—wages and other like debts, and rates and taxes being entitled to preferential payment (*e*). Also, by the 46 & 47 Vict. c. 52, s. 125, where an estate is insolvent, the administration thereof after death may be wholly in bankruptcy; and (by 53 & 54 Vict. c. 71, s. 21), the administration may (for good cause) be transferred from the Chancery Division into the Bankruptcy Division of the Court (*f*), and even into the County Court (*g*). But apparently, no action or suit in equity is now necessary in any case,—not even where the lands are not by the will made subject to the debts,—because, under the Land Transfer Act, 1897 (*h*), sect. 2 (2), the legal personal representative (or, when there are more than one, all the legal personal representatives concurring) may sell the lands for any lawful purposes of the administration,—including, of course, the payment of all the just debts of the deceased.

(*d*) *In re Maggi, Winehouse* v. *Winehouse*, 20 Ch. D. 545.

(*e*) 51 & 52 Vict. c. 62; *Parkington* v. *Heywood*, [1897] 2 Ch. 593.

(*f*) *Jones* v. *Williams*, 36 Ch. Div. 573.

(*g*) *Atkinson* v. *Powell*, 36 Ch. Div. 233.

(*h*) 60 & 61 Vict. c. 65.

CHAPTER XII.

OF TITLE BY ESCHEAT.

ESCHEAT signifies chance or accident; and (in law) is applied to the chance or case (which only very rarely happens) of the owner of an estate in fee simple dying without having disposed of it, and leaving no heir behind him to take it by descent,—in which case, by the doctrine of escheats, the estate results back, by a kind of reversion, to the original grantor or lord of the fee (*h*). And here it is to be observed, that the land so escheating afterwards follows the seigniory, as being a fruit thereof; and if therefore the lord was entitled to the seigniory by purchase, the land escheated will descend to his heirs general, but if by descent, it will be inheritable only by such of his heirs as are capable of inheriting the seigniory (*i*).

In order to complete his title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated; and on failure herein, or in doing any act that amounts to an implied waiver of the escheat, as by accepting rent of a stranger who usurps the possession, his title by escheat is barred (*k*).

The law of escheat is founded upon this single principle, that the inheritance of land held in fee simple having failed, it must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom (or by those whose estate he hath) it was given (*l*).

Escheats have been frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis;* the

(*h*) 11 Feud. 86; Co. Litt. 13 a.
(*i*) Co. Litt. *ubi sup.*
(*k*) Bro. Ab. tit. Acceptance, 25; Co. Litt. 268.
(*l*) Bl. Com. 245.

one sort, if the tenant should die without an heir, the other, if his blood be attainted (*m*); and we propose to advert successively to both sorts, beginning with—

I. Escheats *propter defectum sanguinis*. By the law, as it stood till recently, an escheat of this sort took place,—

First, where the owner in fee simple of land, of which he had been himself the purchaser, died without disposing of the same, and leaving none related to him by consanguinity, or none who was not subject to some disability such as prevented his becoming heir to any person whatever.

Secondly, where the owner in fee simple of land which he had derived by descent from some person as purchaser, (or which was descendible as if one of the owner's ancestors had been the purchaser), died without disposing of the same, and leaving none related by consanguinity to such purchaser or ancestor, or none who was not subject to such disability as just mentioned; but in this latter case, if the last owner died leaving a person related to *him* by consanguinity, though not a relation on the side of him from whom the land had descended, or was descendible (*n*),—in other words, where there should happen to be a total failure of heirs of the purchaser (or where any land is descendible as if an ancestor had been the purchaser thereof, and there is a total failure of the heirs of such ancestor), then, and in every such case, and under the 22 & 23 Vict. c. 35, s. 19, (referred to in the chapter on descents) the land shall descend, and the descent shall thenceforth be traced, from *the person last entitled* to the land, as if he had been the purchaser thereof.

The persons who are under disability to take an heir may be classed as follows:—

1. [A monster, being one, who hath not the shape of mankind, but in any part evidently bears the resemblance

(*m*) Co. Litt. 13 a, 92 b.

(*n*) *Doe* d. *Blackburn* v. *Blackburn*, 1 Moody & Robinson, p. 547.

[of the brute creation ; and he hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage ; but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir (*o*).

2. Bastards, being such children as are not born of lawful wedlock (*p*) ; and all such are held to be *nullius filii*, the sons of nobody, the maxim of the law being, "*Qui ex damnato coitu nascuntur, inter liberos non computantur*" (*q*). And bastards, being thus the sons of nobody, have in them no inheritable blood,—consequently none of the blood of the first purchaser ; and therefore, if there be no other claimant, the land shall escheat to the lord (*r*),—the English law differing in these respects from the civil law (*s*).

There is indeed one instance in which our law has shown bastards some little regard ; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or, as Glanvil expresses it in his Latin, *filius mulieratus* (*t*),—the woman before marriage being *concubina*, and afterwards *mulier ;* and in such a case, the eldest son is *bastard eigné*, and the younger son is *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon the land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue,—in this case, the *mulier puisné* and all other heirs (though minors, married women, &c.) are totally barred of their right (*u*). And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the bastard's life and evicting him. 2. Because the canon law (following the civil) did

(*o*) Co. Litt. 7 b ; Bract. l. 1, ch. 6, s. 7 ; and l. 5, tr. 5, ch. 30, s. 10.

(*p*) 2 Bl. Com. 247.

(*q*) Co. Litt. 8 a ; Bract. *ubi sup.*

(*r*) Finch, Law, 117.

(*s*) Nov. 89, ch. 8 ; ch. 112 ; Cod. 6, 57, 5.

(*t*) L. 7, ch. 1.

(*u*) Litt. s. 399.

[allow such *bastard eigné* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken; and these rules as to the *bastard eigné* applied also when a man had two daughters, the elder of whom was a bastard, and they both entered peaceably as co-parceners (*x*). But this indulgence was shown to no other kind of bastard, — for if the mother was never married to the father, the *bastard eigné* had no title at all (*y*).

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies, all collateral kindred being derived from the same common ancestor, and a bastard having no such ancestor; and therefore if a bastard purchase land, and die seised thereof without issue, and intestate, the land shall escheat to the lord of the fee (*z*);] but, of course, a bastard (equally with any one else) may, by will or deed, dispose of his estate, so as to prevent an escheat thereof (*a*).

3. Aliens also were incapable (prior to the year 1870) of taking by descent (*b*); and therefore, if a man left no other relations but aliens, his land escheated to the lord. Moreover, aliens could not (prior to 1870) have purchased real estate, so as to *hold* it (*c*); and as they could neither hold by purchase, nor take by inheritance, they could have no heirs,—*scil.*, because they could have nothing for an heir to inherit (*d*).

Moreover, at one time, aliens could not be the *channels* of descent; for if an alien came into England, and there

(*x*) Co. Litt. 244 a.
(*y*) Litt. s. 400.
(*z*) Bract. l. 2, ch. 7; Co. Litt. 244.
(*a*) 1 Prest. Est. 468.
(*b*) 2 Bl. Com. 249; Co. Litt. 8 a.
(*c*) Co. Litt. 2 b.
(*d*) 1 Lev. 59.

had issue two sons, and one of them purchased land and died, his brother could not be heir (*e*), the *commune vinculum*, namely the father, communicating no inheritable blood to his sons ; but if the descent from one brother to the other might be considered as *immediate*, and without regard to the *commune vinculum*, then the surviving son might be heir to his brother (*f*).

[The subject, however, of tracing descent through an alien, was latterly regulated by Act of Parliament, the 11 Will. III. c. 6 (*g*) having enacted that all persons natural-born subjects of the king, might inherit and make their title by descent from any of their ancestors, (lineal or collateral,) although their father or mother, or other ancestor, by, from, through, or under whom they derived their pedigrees, were born out of the king's allegiance.] And such is still the law as to tracing descent in cases to which the "Naturalization Act, 1870" (33 & 34 Vict. c. 14), is inapplicable ; but by the second section of that Act, it has been provided, with regard to all titles accruing *after* the 14th May, 1870, that real property of every description may be taken, acquired, held and disposed of by an alien, in the same manner in all respects as by a natural-born British subject ; and that a title thereto may be derived through, from, or in succession to an alien as if he had been a natural-born British subject (*h*).

II. Escheats *propter delictum tenentis* :—These happened, where, by attainder, the blood of the person attainted became, in the eye of the law, so corrupted as to be no longer inheritable ; for attainder imports that extinction of civil rights and capacities which took place whenever a person who had committed treason or other felony received judgment of death or outlawry for his crime.

(*e*) Co. Litt. 8 a.

(*f*) *Collingwood* v. *Pace*, 1 Vent. 415; 1 Lev. 59; 1 Sid. 193; *Kynnaird* v. *Leslie*, Law Rep., 1 C. P. 389.

(*g*) 25 Geo. 2, c. 39; Co. Litt. by Harg. 8 a (n.).

(*h*) 33 & 34 Vict. c. 14, s. 2.

The old law with respect to corruption of blood upon attainder, and the consequent escheat of the lands and tenements of the offender to the lord of the fee, has been so much altered by the modern enactments to which we shall presently refer, as to have lost much of its former importance ; still some account of it is desirable (*i*).

According to the antient law, by the commission of treason or other felony, the blood of the tenant was corrupted and stained, and the original donation of the feud was thereby determined, it being always granted to the vassal on the implied condition of *dum se bene gesserit* ; upon the thorough demonstration of which guilt by legal attainder, the feudal covenant and mutual bond of fealty were held to be broken, the estate instantly fell back from the offender to the lord of the fee, and the inheritable quality of the blood was extinguished and blotted out for ever.

Escheat to the *lord* by reason of his tenant's attainder, must be distinguished from forfeiture to the *crown* ; for, independently of any escheat, the felon's lands and tenements (to the extent of his interest therein) were, by force of the attainder, immediately forfeited to the crown (*k*) ; and escheat to the lord operated in subordination to forfeiture to the crown,—although where the crown was also the lord, the distinction became immaterial.

Forfeiture extended only to estates which were vested in the offender, at the time of the attainder ; but escheat pursued the matter further,—for the blood of the tenant being, by the attainder, utterly corrupted and extinguished, it followed, not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future. For example, if a father was seised in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord,—because the son, by the corruption of his blood, was incapable to be heir, and there could

(*i*) 2 Bl. Com. 252—256. (*k*) 1 Inst. 64 ; 1 Salk. 85.

be no other heir during his life; but nothing would in such a case be forfeited to the king, for the son never had any interest in the land to forfeit (*l*). But where a new felony was created by Act of Parliament, and the Act provided (as was frequently the case) that the offence should not extend to corruption of blood,—the lands of the felon would not escheat to the lord, but the profits of them would be forfeited to the king for a year and a day, and so long after as the offender lived (*m*).

It was a further consequence of the corruption of hereditary blood, that the person attainted would not only be incapable himself of inheriting, or of transmitting his own property to an heir, but he would also obstruct the descent of lands or tenements to his posterity, in all cases where they derived title through him from any remoter ancestor (*n*), a refinement upon the antient law of feuds, which allowed the grandson to be heir to the grandfather, though the son had been guilty of felony (*o*).

The consequences of corruption of blood could not be removed but by authority of Parliament; for although the king might excuse the punishment of the offender, even the king could not defeat or abrogate the private right accrued by the attainder; he might remit the forfeiture, in which the interest of the crown alone was concerned, but he could not wipe away the corruption of blood, so as to affect the right of escheat to the lord. And if, therefore, a man had a son, and was attainted, and afterwards pardoned by the king, this son could never inherit to his father, or to his father's ancestors,—because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so; but if the son had been born *after* the pardon, he might have inherited,—because (by the pardon) the father was made a new man, and might convey new inheritable blood to his after-born children (*p*).

(*l*) Co. Litt. 13 a.
(*m*) 3 Inst. 47.
(*n*) Co. Litt. 391 b.
(*o*) Van Leeuven, in 2 Feud. 31.
(*p*) Co. Litt. 392 a.

But the doctrine of corruption of blood on attainder, arising as it did from feudal principles, and perhaps extending further even than those principles warranted, gradually came to be regarded as a peculiar hardship; and therefore in most (if not in all) of the new felonies from time to time created by Act of Parliament since the reign of Henry the Eighth, it has been usual to declare, that they should not extend to any corruption of blood; and by the 54 Geo. III. c. 145, it was provided, that no attainder for felony, except for *treason* or *murder*, should extend to the disinheriting of any person other than the offender himself during his life. And now, by the Inheritance Act (3 & 4 Will. IV. c. 106), s. 10, when the person, from whom descent is to be traced, has had any relation who having been attainted has died before such descent, such attainder will not prevent the descent from being traced through such relation, unless where the estate has already escheated on such attainder before 1st January, 1834. Moreover, by the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 46, it was enacted that no lands, stock, or chose in action, vested in any person upon any *trust*, or by way of *mortgage*, should escheat by reason of the attainder or conviction of the trustee or mortgagee for any offence; and by the 33 & 34 Vict. c. 23, s. 1, no confession, verdict, inquest, conviction, or judgment for any treason or felony or *felo de se*, after the 4th day of July, 1870, is to cause any attainder or corruption of blood or any forfeiture or escheat (*q*); and as regards any trustee or mortgagee becoming a convict within the meaning of that Act, it has now been provided by the Trustee Act, 1893 (*r*), s. 48, that the legal estate shall remain in such convict, or (as the case may be) survive to his co-trustee or co-trustees or

(*q*) The Act, however, preserves *in statu quo* the law of forfeiture consequent on *outlawry* (33 & 34 Vict. c. 23, s. 1); but inasmuch as outlawry in all *civil* proceedings has been abolished by the 42 & 43 Vict. c. 59, the exception of outlawry can now only refer to *criminal* proceedings.

(*r*) 56 & 57 Vict. 53.

descend to his representative, exactly as if he had not become a convict.

In cases where (under the former law) an escheat or forfeiture of the beneficial interest in lands actually took place, its consequences were frequently remitted, when the crown was the party entitled to take the benefit ; for the sovereign was, by modern Acts of Parliament, frequently empowered to make grants for the purpose of restoring the lands to the family of the former beneficial owner (*s*) ; and now by the Intestates Estates Act, 1884 (*t*), s. 6, this power in the crown has been declared generally, and the mode of application to the crown for a waiver of the forfeiture or escheat, is also thereby prescribed ; and the effect of the restoring grant is declared to be the same as that of a crown grant made after office-found,—unless, within two years of the grant, an inquisition shall have issued in the manner prescribed by the statute.

(*s*) 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24 ; 59 Geo. 3, c. 94 ; 6 Geo. 4, c. 17.

(*t*) 47 & 48 Vict. c. 71.

CHAPTER XIII.

OF TITLE BY OCCUPANCY.

[Occupancy is the taking of possession of things which belong to nobody, *quod nullius est*, *id* ratione naturali *occupanti conceditur* (*u*). But title by occupancy, so far as it concerns real property (for of personal chattels we do not in this place speak), hath been confined by the laws of England within a very narrow compass, applying only to the single instance where a man was tenant *pur autre vie*, and died during the life of *cestui que vie*,—in which case, he that could first enter on the land might, by right of *common* occupancy (*x*), have lawfully retained the possession so long as *cestui que vie* lived. It is open to remark, however, that a title acquired by *adverse possession* under the Statutes of Limitation, is also a sort of title by occupancy ; and a title so acquired is a fee simple title (*y*),—or (where acquired by a tenant for life) would be acquired for all persons (including the tenant for life himself) who were entitled under a purported settlement of the land, whether such settlement were contained in a will (*z*), or in a deed (*a*).

Land granted to A. during the life of B., did not, on A.'s death during B.'s life, revert to the grantor, though at one time it was supposed so to do (*b*),—for the grantor had parted with all his interest so long as *cestui que vie* lived ; and the land did not escheat to the lord of the fee,—for all escheats must be of the absolute entire fee, and not of any

(*u*) Ff. 41, 1, 3.

(*x*) Co. Litt. 41 b.

(*y*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

(*z*) *Board* v. *Board*, L. R. 9 Q. B. 48.

(*a*) *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86.

(*b*) Bract. l. 2, ch. 9 ; l. 4, tr. 3, ch. 9, s. 4 ; Flet. l. 3, ch. 12, s. 6 ; l. 5, ch. 5, s. 15.

[particular estate carved out of it, much less of so minute a remnant as this ; and the land did not descend to the heirs of the grantee,—for there were no words of inheritance in the grant ;] and it did not vest in the executors of the grantee,—for (at the period of which we speak) an estate *pur autre vie* seems not to have been devisable by will (*c*) ; and belonging therefore to nobody, the law left it open to be seized and appropriated, under the name of an occupancy, by the first person that could enter upon it during the life of *cestui que vie* (*d*). But if the estate *pur autre vie* had been granted to a man *and his heirs* during the life of *cestui que vie*, there could not then have been a title by common occupancy, but the heir of the grantee would succeed, and was called a *special* occupant (*e*) ; and so the law continues to this day,—the heir succeeding in virtue of the original grant, and occupying the land during the residue of the estate granted ; and some have said that the heir (though termed a special occupant) takes, in reality, by descent, the estate, though not a fee, being a descendible freehold (*f*).

An estate *pur autre vie* may be granted not only to a man and his heirs, but to a man and the heirs of his body ; and this is termed a *quasi entail*,—the interest so granted not being properly an estate tail,—for the statute *De donis* applies only where the subject of the entail is an estate of inheritance (*g*),—but yet so far in the nature of an estate tail, that it will go to the heir of the body of the grantee as special occupant, during the life of *cestui que vie* ; and an estate *pur autre vie* so limited in *quasi* entail may be also granted with a remainder thereon during the life of *cestui que vie*,—in which case, the alienation of the *quasi* tenant in tail will bar not only the issue but also the

(*c*) Powell on Devises, p. 34.

(*d*) 2 Bl. Com. p. 259.

(*e* *Atkinson* v. *Baker*, 4 T. R. 229 ; *Carpenter* v. *Dunsmure*, 3 Ell. & Bl. 918 ; *Fitzroy* v. *Howard*, 3 Russ. 230.

(*f*) *Doe* v. *Martin*, 2 W. Bl. 1150 ; *Bearpark* v. *Hutchinson*, 7 Bing. 188.

(*g*) Co. Litt. by Harg. 20 a, n. (5).

remainderman ; and the alienation for that purpose (unlike that of an estate tail properly so called) may be effected by any unenrolled deed (*h*).

In order to remedy the inconvenience attaching to the previous law with regard to the occupancy of estates *pur autre vie*, during the interval between the death of the owner and that of the *cestui que vie*, it was provided by the Statute of Frauds (29 Car. II. c. 3), s. 12, and by 14 Geo. II. c. 20, s. 9, that an estate *pur autre vie* should be devisable, and (in default of such disposition) it was made liable, in the hands of the heir as special occupant.—or of the personal representatives, as the case might be,—to the debts of the deceased owner ; and subject thereto, it was made distributable among his next of kin (*i*) ; and by the new Wills Act (7 Will. IV. & 1 Vict. c. 26), it has been provided, that an estate *pur autre vie*, of whatever tenure, and whether it be a corporeal or incorporeal hereditament, may be devised by will (*k*) ; that if no disposition by will be made of an estate *pur autre vie* of a freehold nature, it shall be chargeable in the hands of the heir (if it comes to him by reason of special occupancy) as assets by descent, as in the case of freehold land in fee simple (*l*) : and that in case there shall be no special occupant of an estate *pur autre vie*, of whatever tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant (*m*) : and that it shall in every case be assets of the deceased to be applied and distributed in the same manner as personal estate (*n*).

Save in the case of the estate *pur autre vie* (now provided for by statute), it is difficult to mention any other instance wherein, by our law, there is not some owner of the land (*o*).

(*h*) *Norton* v. *Frecker*, 1 Atk. 524; *Hopkins* v. *Ramadge*, 1 Batty, 365.

(*i*) Co. Litt. by Harg. 41 b, n. (5); *Doe* d. *Lewis* v. *Lewis*, 9 Mee. & W. 662.

(*k*) 7 Will. 4 & 1 Vict. c. 26, s. 3.

(*l*) Sect. 6.

(*m*) *Sheppard* v. *Manning*, [1897] 2 Ch. 67.

(*n*) Sect. 6.

(*o*) 2 Bl. Com. p. 261.

[For, in the case of a sole corporation, as the parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal*, *potential* ownership subsisting in contemplation of law,—so that, when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced.] And where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters,—in these instances, the law of England assigns them an immediate owner (*p*). Thus, in case a new island rise in the *sea*, though the civil law gives it to the first occupant (*q*), yet ours gives it to the sovereign (*r*) ; and as to lands gained from the sea, either by *alluvion* or by *dereliction*, in these cases the law is, that if the gain be by little and little, it shall go to the owner of the land immediately behind ; but if the alluvion or dereliction be sudden and considerable, in that case it belongs *de jure communi* to the crown,—for the soil, when the sea flowed over it, was *primâ facie* the crown's property (*s*), and therefore ought to remain so, though no longer covered by the sea (*t*). And upon the same principle, a sudden inundation from the sea will not deprive the former owner of the land submerged of his previous property therein (*u*) ; though, on the other hand, where the sea gains upon the land by gradual advances, the crown becomes also the owner of the land newly covered with water, as parcel of the shore (*x*).

[When an island rises in the middle of a *river*, it belongs, according to Bracton, to those who have lands on each side

(*p*) 2 Bl. Com. p. 261.

(*q*) Inst. 2, 1, 22.

(*r*) Hale, *de Jure Maris*, p. 17; Callis, of Sewers, p. 45.

(*s*) Hale, *ubi sup.* p. 14; *Blundell* v. *Catterall*, 5 B. & Ald. 268.

(*t*) 2 Bl. Com. 262; Hale, *ubi sup.*; 2 Roll. Abr. 170; Dyer, 326; Callis, pp. 51, 53; *Scratton* v. *Brown*, 4 Barn & Cress. 505.

(*u*) Hale, *de Jure*, &c., pp. 15, 17.

(*x*) *In re Hull and Selby Railway*, 5 Mee. & W. 327.

[thereof, in common ; but if it be nearer to one bank than the other, it belongs exclusively to him who is the proprietor of the nearest bank (*y*) ; but when the whole soil or bed of the river belongs exclusively to, and is the freehold of, one man,—as usually happens when a several fishery is claimed (*z*),—there it seems just to hold, that the eyots or little islands, arising in any part of the river, shall be the property of him who owneth the fishery and the soil.

Where a river running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy ; but if the course of the river be changed by a sudden and violent flood, or other hasty means, his land will not be lost (*a*).]

(*y*) Bract. lib. 2, ch. 2.
(*z*) *Smith* v. *Kemp*, Salk. 637 ; *Foster* v. *Wright*, 4 C. P. D. 438.
(*a*) Callis, p. 51.

CHAPTER XIV.

OF TITLE BY FORFEITURE.

FORFEITURE, generally, is a punishment annexed by the law to some illegal act (*b*),—as was indicated in the chapter "Of Title by Escheat"; but there are certain specific forfeitures connected with the law of land which require to be separately considered, namely, the following three: (1) Forfeiture by alienation in mortmain; (2) Forfeiture by the wrongful alienation of the tenants of particular estates; and (3) Forfeiture by the wrongful disclaimer of a tenant.

1. Forfeiture by alienation in mortmain:—[Alienation in *mortmain* is an alienation of lands or tenements to any corporation,—sole or aggregate, ecclesiastical or temporal (*c*); and these alienations having been chiefly made to religious houses, the religious houses themselves have been principally considered in forming the statutes of mortmain.]

By the common law, a corporation is as capable of purchasing lands as any individual (*d*)—subject to this distinction, that persons corporate take the fee to their *successors*, instead of their *heirs*; and it has always been necessary for corporations to have a licence in mortmain from the crown, to enable them to become the holders of lands (*e*),—for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of the lands in tenants who can never die. [And

(*b*) 2 Bl. Com. p. 267.
(*c*) Co. Litt. 2 b.
(*d*) *Case of Sutton's Hospital*, 10 Rep. 30; Co. Litt. 2 b.
(*e*) F. N. B. 221; Hallam, Middle Ages, vol. ii. p. 321, 7th ed.

[besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land ; and if no such licence was obtained, the king or other lord might enter on the lands so aliened in mortmain, as for a forfeiture.]

Yet such was the ingenuity of the clergy, that, notwithstanding this fundamental principle, the religious houses (under deeds of gift) held large possessions and (in effect) without licence,—whereby the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn, and lords were curtailed of their escheats, reliefs, and the like ; and therefore, it was ordered, by the second of King Henry the Third's great charters, and afterwards by that printed in our common statute books, that all such gifts should be void, and the lands forfeited to the lords of the fee (*f*).

But as this prohibition extended only to the religious *houses* (*i.e.*, ecclesiastical corporations aggregate), bishops and other sole corporations were not included therein ; and the ecclesiastical corporations aggregate found many expedients of evading the statute, by, *e.g.*, buying in lands that were holden of themselves as lords of the fee, or by taking long leases for a thousand or more years ; wherefore by the *statute De religiosis*, 7 Edw. I., it was provided, that *no person* (religious or other whatsoever) should buy, or sell, or receive under pretence of a gift or lease,—nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain, upon pain that the immediate lord of the fee,—or, on his default for one year, the lords paramount : and, in default of all of them, the king,—might enter thereon as for a forfeiture.

The statutes referred to extending, however, only to gifts and voluntary conveyances between the parties, the

(*f*) Mag. Chart. (25 Edw. I).

[religious houses now began to set up a fictitious title to the land which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence,—whereupon judgment was given for the religious houses to *recover* the land upon their supposed prior title, the religious houses thus inventing those fictitious adjudications of right which afterwards, under the name of *common recoveries*, became the great assurances of the kingdom (*g*). But, upon this, the statute of Westminster the Second (13 Edw. I.) c. 32, enacted, that in such cases a jury should try the true right of the demandants or plaintiffs to the land ; and if the religious corporation was found to have it, they should still recover, but otherwise the land should be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default,—the like provision being at the same time made (by c. 33) against tenants who set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders ; and when the statute *Quia emptores* (18 Edw. I. c. 3) abolished subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted in the Act, to the effect that that should not extend to authorize alienation in mortmain (*h*) ; and afterwards when the method of obtaining the king's licence by writ *ad quod damnum* was recognized by the 27 Edw. I. (stat. 2), it was provided, by the 34 Edw. I. (stat. 3), that no such licence should be effectual *without the consent of the mesne lords* (*i*).

The next evasion resorted to by the religious houses, was (or consisted in) the adoption of a new method of conveyance,—by which the lands were granted, not to

(*g*) Hist. Eng. Law, by Reeves, vol ii. p. 155.

(*h*) 2 Inst. 501.

(*i*) Hist. Eng. Law, by Reeves, vol. ii. p. 230.

[themselves directly, but to feoffees *to their use*, whereby they received the actual profits, without becoming entitled to the lands themselves, the seisin of the lands remaining in the feoffees,—whereupon, by the 15 Rich. II., c. 5, it was enacted, that uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves; and the Act extended to all corporations, whether ecclesiastical or not.

However, as regards all alienations to bodies corporate, it was always in the power of the crown, by granting a *licence of mortmain*, to remit the forfeiture, so far as related to its own rights; and this prerogative is confirmed by the 18 Edw. III. stat. 3, c. 3; and when, through the long operation of the statute of *Quia emptores*, the rights of mesne lords were reduced within a very small compass, it was therefore declared, by 7 & 8 Will. III. c. 37, that the crown for the future, at its own discretion, might grant licences to aliene or take in mortmain, *of whomsoever the tenements might be holden.*

It is to be observed also, that the statutes of mortmain were wholly suspended for twenty years, by the 1 & 2 Ph. & M. c. 8, during which suspension any lands or tenements might have been granted to spiritual corporations without any licence;] and that by the 17 Car. II. c. 3, and by many subsequent Acts—among which may be particularized 2 & 3 Anne, c. 20, 43 Geo. III. c. 108, 55 Geo. III. c. 147, 3 & 4 Vict. c. 60, 6 & 7 Vict. c. 37, s. 22, 17 & 18 Vict. c. 84, and 19 & 20 Vict. c. 104, s. 23—lands might be conveyed for the augmentation of *poor livings* free from the restrictions of the statutes of mortmain; and under divers modern statutes, grants of land are now, without any licence in mortmain, permitted to be made to corporate bodies, for purposes connected with the *education of the poor*, and for other like purposes (*k*);

(*k*) See 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 16 & 17 Vict. c. 137, s. 27; 17 & 18 Vict. c. 112; 18 & 19 Vict. c. 124, ss. 35, 41; 31 & 32 Vict. c. 44; 45 & 46 Vict. c. 21; and 53 & 54 Vict. c. 19,—as to sites

also, by the 33 & 34 Vict. c. 34, trust funds held for *public* and *charitable purposes* may be invested in real securities, without the trustees being deemed thereby to have acquired land within the meaning of the Mortmain Acts.

There had been a statute (23 Hen. VIII. c. 10) declaring that all grants of land to *trustees* upon trust for parish churches and the like (other than leases for 20 years) should be void; but it was held, upon the construction of the statute, that the statute extended only *superstitious* uses (*l*); and that a man might therefore give lands, notwithstanding that statute, on trust for the maintenance of a school, or the sustenance of poor people, or upon any other *charitable* use (*m*); and it being apprehended, that persons on their death-beds might make "large and improvident" dispositions even for these good purposes, to the disherison of their lawful heirs, it was therefore enacted, by the "Mortmain Act," 9 Geo. II. c. 36 (*n*), that (in effect) all gifts by *will* (*o*) for charitable purposes should be simply void; and that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or incumbered, in trust for, or for the benefit of, any *charitable* use whatsoever, unless by *deed* (*p*), executed in

for buildings for *religious, educational*, and other charitable purposes; 22 Vict. c. 27, ss. 1, 2, and 34 & 35 Vict. c. 13, as to *recreation grounds, public parks*, &c.; and 55 & 56 Vict. cc. 11, 31, as to *small holdings* and other *public* purposes, under County Councils (51 & 52 Vict. c. 41) and Parish Councils (56 & 57 Vict. c. 73). See also 23 & 24 Vict. c. 134, s. 3, as to certain *Roman Catholic charities*; and 45 & 46 Vict. c. 73, as to the sites of *ancient monuments*.

(*l*) *Porter's Case*, 1 Rep. 24; *Adams and Lambert's Case*, 4 Rep. 104; *Da Costa* v. *De Pas*, Ambl. 228.

(*m*) 43 Eliz. c. 4; 52 Geo. 3, c. 101; Bac. Abr. Char. Us.

(*n*) *Att.-Gen.* v. *Stewart*, 2 Meriv. 161; *Luckraft* v. *Pridham*, 6 Ch. D. 214.

(*o*) *Brook* v. *Badley*, L. R. 3 Ch. App. 672.

(*p*) Under the 9 Geo. 2, c. 36, such deed was required also to be *indented*; but by 24 & 25 Vict. c. 9, s. 1, it needed not either to be indented or to purport to be indented; and such continues to be the law (51 & 52 Vict. c. 42).

the presence of two witnesses twelve calendar months before the death of the donor (*q*), and enrolled in Chancery within six calendar months after its execution (*r*),—and unless such gift was made to take effect immediately (*s*), and was without power of revocation, or other clause or covenant for the benefit of the donor, or of those claiming under him ; and if these several conditions were not complied with, not only was the charitable use inoperative, but the conveyance itself was void to all intents and purposes (*t*). Latterly, however, by the 24 & 25 Vict. c. 9 (amended by the 25 & 26 Vict. c. 17), in any assurance for charitable uses made after the 17th May, 1861, certain exceptions and reservations, clauses and covenants in the donor's favour were permitted, that is to say :— exceptions and reservations of mines and minerals, and of easements ; clauses and covenants relating to buildings, roads, and the like ; and other stipulations of the like nature,—the donor, however, reserving, in all such cases, for his representatives the same benefits as for himself. Also, where the transaction was a *bonâ fide* purchase, a full valuable consideration being paid down, or reserved by way of annual payment (*u*), the conveyance was not within the Act at all ; and under subsequent statutes (*x*), such purchases would have been valid, notwithstanding the death of the vendor within twelve months after the

(*q*) *Wickham* v. *Marquis of Bath*, Law Rep., 1 Eq. Ca. 17.

(*r*) However by 29 & 30 Vict. c. 57, deeds otherwise valid, but not theretofore enrolled, might be authorized to be enrolled, on the court being satisfied that the deed was made *bonâ fide* for full and valuable consideration, and that the omission to enrol arose from mere ignorance, inadvertence, or accident; and this provision is maintained by sect. 5 of the 51 & 52 Vict. c. 42.

(*s*) A demise would be deemed to take effect *immediately*, if it took effect within a year from its date (26 & 27 Vict. c. 106 ; which statute not being among those repealed by the 51 & 52 Vict. c. 42, is still in force).

(*t*) *Doe* v. *Wrighte*, 2 Barn. & Ald. 710.

(*u*) 9 Geo. 2, c. 36, s. 1.

(*x*) 9 Geo. 4, c. 85 ; 27 & 28 Vict. c. 13, s. 4.

execution of the deed. Gifts to the Universities of Oxford and Cambridge, or to any of their colleges, or in trust for the scholars on the foundations of Eton, Winchester, and Westminster (*y*),—or in favour of the British Museum (*z*), —were also entirely exempted from the operation of the Mortmain Acts.

The law as to alienation in mortmain and as to gifts of lands for charitable purposes is now contained in the Mortmain and Charitable Uses Act, 1888 (*a*), whereby the former provisions regarding mortmain and charitable uses respectively have been consolidated, with some very slight amendments, and all the earlier Acts have been repealed. And, Firstly, as regards Alienation in Mortmain :—Land may not (except with the licence of the crown) be acquired "by or on behalf of any corporation" not authorized in that behalf by statute, under pain of forfeiture of such land to the crown, failing entry by the mesne lord (if any) for twelve months (*b*) ; but the sovereign may grant licences to aliene and to acquire in mortmain (*c*). And, Secondly, as regards Assurances to Charitable Uses :—The assurance of the land or of the money to be laid out in the purchase of land (unless it be a registered disposition under the Land Transfer Act, 1875), must be by deed, with two witnesses, executed twelve calendar months before the death, and enrolled in the Supreme Court (Central Office) within six calendar months of its execution, and taking effect in possession immediately, and being without any power of revocation or reservation other than of a peppercorn rent, or of mines or minerals, or of easements, or of building provisions, and (in the case of *bonâ fide* purchase deeds) other than of a rent or rent-charge regarded as portion of the purchase-money payable ; and stock to be laid out in land must be transferred in the books of the company six calendar

(*y*) 9 Geo. 2, c. 36, s. 4.
(*z*) 5 Geo. 4, c. 39.
(*a*) 51 & 52 Vict. c. 42.
(*b*) Sect. 1.
(*c*) Sect. 2.

months before the death (*d*). But assurances for the purposes of a public park, or of an elementary school-house, or of a public museum, are excepted ; and as regards such assurances, which may, in general, be either by deed or by will (but, in the case of a local authority, by deed only), it is only required, that they shall be executed twelve calendar months before the death, and be enrolled with the Charity Commissioners six calendar months after the death ; but the acreage of the land given must not exceed one acre for a school-house, two acres for a museum, and twenty acres for a park ; and under the 55 & 56 Vict. c. 11, the like assurances, subject to the like restrictions and no others, may be made to any local authority for the lawful purposes of such authority. Also,—but under the principal act, that is to say, the 51 & 52 Vict. c. 42,—the Universities of Oxford, Cambridge, London, and Durham, and their several colleges, and the colleges of Eton, Winchester, and Westminster, and Keble College, and the Victoria University, are wholly exempted from the charitable provisions of the Act (*e*).

By the Mortmain Act, 1891 (*f*), it has been further enacted, that land may be assured by *will* to a charitable use, subject to this, that the land must be sold within a year from the death of the testator, or within such extended time as shall be allowed either by the High Court or by the Charity Commissioners ; and if the land remains unsold after the time limited for the sale thereof, it is to vest in the official trustee of charity lands,—thereafter to be sold as soon as may be under the order of the Charity Commissioners, the proceeds of sale (less the expenses) vesting in the official trustees of charitable funds in trust for the charity ; but these provisions extend only to the wills of testators dying after the 5th August, 1891 (*g*); but either, the High Court or the Charity Commissioners may, being first satisfied that the land is wanted for actual

(*d*) Sect. 4.
(*e*) 51 & 52 Vict. c. 42, s. 7.
(*f*) 54 & 55 Vict. c. 73.
(*g*) *Ib.* s. 9.

occupation by the charity, authorize the permanent retention of the land unsold of the charity. The Act of 1891 also provides, as regards money given by will to a charity, with a superadded direction to lay out such money in the purchase of land, that the gift shall be good, the superadded direction only being void (*h*); and money secured on land, or other personal estate arising from or connected with land, is no longer to be regarded as land within the meaning of the Mortmain Acts (*i*).

2. [Forfeiture by the wrongful alienation of the tenants of particular estates:—When the tenants for particular estates (*e.g.*, tenants for life or for years) conveyed by common law conveyances, such as feoffment, fine, or recovery, a greater estate than the law entitled them to make, these wrongful conveyances on their parts were, at common law, forfeitures to the person in immediate remainder or reversion (*k*). As if tenant for his own life aliened by feoffment for the life of another, or aliened in fee or in tail,—these being estates which either must or might last longer than his own, the creating them was deemed inconsistent with the nature of his interest, and was a forfeiture of his own particular estate, to him in remainder or reversion, who was entitled to enter immediately (*l*),—the reason being that the tenant, by thus taking upon himself to assert a more extensive right than he derived from the lord of the fee, had violated the feudal compact (which bound him to fidelity) (*m*), and had therefore, by his own act, determined his own original interest (*n*). But if a tenant in tail aliened in fee, this was a mere *discontinuance* of the estate tail (*o*), which the

(*h*) 54 & 55 Vict. s. 7.

(*i*) *Ib.* s. 3.

(*k*) Co. Litt. 251; *Podger's Case*, 9 Rep. 106 b.

(*l*) Blackstone (vol. ii. p. 274) cites Litt. s. 415.

(*m*) Gilb. Ten. 38, 39.

(*n*) Bl. Com. *ubi sup.*

(*o*) Co. Litt. 328 a; 2 Inst. 335; Co. Litt. by Butler, 333 a, n. (1).

[issue might afterwards avoid by one of the class of actions called *real*,—or (after the abolition of real actions) by entry; and therefore this wrongful alienation was no forfeiture (*p*).

The forfeiture which results from the wrongful alienation of a tenant for life or for years differs altogether from the forfeiture which accrues upon the breach of a condition in deed to which we had occasion to refer in a former chapter; for in the latter case the reversioner is *in* as of his former seisin, and not only the estate of the particular tenant himself, but all interests derived out of that estate (even before the forfeiture) are defeated (*q*): but in the case of forfeiture upon wrongful alienation, all estates and charges lawfully created and made before the forfeiture are and continue good, the forfeiture merely operating as a voluntary surrender would do.] The whole subject, however, of forfeiture upon a wrongful alienation has now lost much of its importance, in consequence of changes in the law relative to conveyances, viz. the abolition of fines and recoveries by the 3 & 4 Will. IV. c. 74, and the provision of the 8 & 9 Vict. c. 106, s. 4, that "a feoffment made "after 1st of October, 1845, shall not have any tortious "operation."

3. [Forfeiture, by the wrongful disclaimer of a tenant:—Where the tenant of a particular estate (*e.g.*, a tenant for life or for years) neglects to render his lord the due services, and upon an action brought to recover them, disclaims to hold of his lord,—that disclaimer of tenure, in a court of record, is a forfeiture of the lands upon reasons most apparently feudal (*r*).] And so, likewise, if the particular tenant does any act which amounts to a *virtual* disclaimer,—as if, being tenant for life only, he claims,

(*p*) 2 Bl. Com. p. 275.

(*q*) Gilb. Ten. 200; Dy. 344 a; 4 Rep. 24 a; Co. Litt. 234 a; 1 Roll. Ab. 474.

(*r*) Finch, 270, 271.

in a court of record, to have a larger interest (*s*) ; and where a tenant for years gave up possession of the demised premises to a third party who claimed paramount to the landlord, with intent to assist that party in setting up the adverse title—such behaviour was held to work a forfeiture of the lease (*t*).

(*s*) Co. Litt. 251 b.

(*t*) *Doe* d. *Ellerbrook* v. *Flynn*, 4 Tyrw. 619 ; *Doe* d. *Graves* v. *Wells*, 10 Ad. & El. 427.

CHAPTER XV.

OF TITLE BY ALIENATION.

THE most usual title to real estates is that by *alienation* or voluntary conveyance, whether effected upon a sale or upon any other occasion.

[By the feudal law, the *feudum proprium*, or pure and genuine feud, could not be transferred from one feudatory to another, without the consent of the lord,—lest thereby a feeble tenant should be substituted to perform the feudal services, instead of one on whose abilities and fidelity the lord could depend ; and as the feudatory could not aliene the feud in his lifetime, so neither could he by will defeat the succession, nor even alter the course of it. And, in fact, the feudatory could not, at one time, have aliened, even with the consent of the lord, unless he also obtained the consent of his own next heir (*u*) ; and it was usual therefore in very antient feoffments, to express that the alienation was made with consent of the heirs of the feoffor ; and sometimes the heir apparent himself joined with the feoffor in the conveyance (*x*). And the feudal obligation being reciprocal, the lord, on his part also, could not aliene or transfer his seigniory without the consent of the tenant,—for it was esteemed unreasonable to subject the feudatory to a new superior without his own approbation (*y*). This consent of the tenant to the lord's alienation was expressed by what was called *attorning*, or professing to become the tenant of the new lord ; and the doctrine of attornment was afterwards extended to all lessees for life or years,—so that, upon every grant of a remainder or of a reversion,

(*u*) Co. Litt. 94 ; Wright, Ten. 169.

(*x*) Madox, Formul. Angl. Nos. 316, 319, 427.

(*y*) Gilb. Ten. 83.

[attornment was necessary, in order to complete the alienation (*z*).

By degrees the feudal severity wore off; and a law of King Henry the First allowed a man to sell and dispose of lands which he himself had *purchased*,—as contra-distinguished from those he had acquired by *descent* (*a*); and yet originally he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene the paternal estate (*b*),—although afterwards he was at liberty to do so, provided he had previously purchased them to him and his *assigns* by name (*c*); and he was also then allowed to part with one-fourth of the inheritance of his ancestors, without the consent of his heir (*d*); but by the great charter of Henry the Third, no alienation was permitted of any part of the land, unless sufficient was left to answer the services due to the superior lord (*e*),—which sufficiency was probably interpreted to be one-half (*f*).

As regards alienation *inter vivos*, all restrictions thereon were removed by the statute of *Quia emptores* (18 Edw. I.), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion, subject only to the provision that all conveyances of the fee should be to hold of the chief lord, and not of the grantor; and by the statute 1 Edw. III. st. 2, c. 12, the king's tenants *in capite* also were permitted to aliene on paying a fine to the king (*g*), —which fine was removed by the temporary statutes

(*z*) Gilb. Ten. 90, 91.

(*a*) "*Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.*" —Wilkins, Leg. Ang.-Sax. LL. Hen. 1, c. 70; Feud. l. 2, t. 39.

(*b*) "*Si questum tantum habuerit is, qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum hæredem exhæredare.*"—Glanv. l. 7, ch. 1.

(*c*) Mirr. ch. 1, s. 3.

(*d*) Mirr. *ubi sup.*

(*e*) 9 Hen. 3, c. 32.

(*f*) Dalrymple, of Feuds, 95; 2 Bl. Com. p. 161.

(*g*) 2 Inst. 67.

[7 Hen. VII. c. 2, and 3 Hen. VIII. c. 4, in the case of all persons attending the king in his wars; and fines on alienation were entirely abolished, in the case of freehold lands, by the 12 Car. II. c. 24. And as regards alienation by will, the ancient restrictions were partially taken off by the old Statute of Wills (32 Hen. VIII. c. 1), and were eventually wholly removed, as an effect of the abolition of military tenures by the 12 Car. II. c. 24,—for the statute 32 Hen. VIII. c. 1, enabled tenants to devise the entirety of their *socage* lands, and all lands held by knight's service were, by the 12 Car. II. c. 24, converted into socage. And ultimately, by the 4 & 5 Anne, c. 3 (sometimes cited as 4 Anne, c. 16), s. 9, attornment ceased to be necessary to complete any voluntary grant or conveyance. But, of course, attornment is still necessary in the case of lands being taken upon an elegit or otherwise under a judgment obtained *in invitum* (*h*); and when the court appoints a receiver, it invariably directs that the tenants shall attorn to the receiver, that proceeding also being a proceeding *in invitum* (*i*). And we may also here observe, that, by the 11 Geo. II. c. 19, s. 11, the fraudulent attornment of the tenant to a stranger, to the prejudice of his landlord, is rendered wholly inoperative (*k*).]

The result of the several relaxations above referred to has been, the complete disengagement of the realty from all the feudal restraints on alienation,—so that, subject to very few exceptions, all estates in land are now freely transferable, unless granted under express stipulation to the contrary; and such stipulations are in most instances inefficacious to the end designed,—for if repugnant to the estate granted, or if otherwise contrary to the policy of the law, they are regarded as void and disregarded. Thus, if an estate be conveyed in fee simple, with a condition prohibiting the grantee and his heirs, or the grantee

(*h*) *Harris* v. *Booker*, 4 Bing. 99.

(*i*) *Bailey* v. *Barnes*, [1894] 1 Ch. 25.

(*k*) 4 Geo. 2, c. 28, s. 6; 5 & 6 Vict. c. 108, s. 16; *Brown* v. *Storey*, 1 Man. & Gr. *innotis*, p. 129.

himself, from all alienation thereof, the condition is merely void (*l*); and a similar proviso, annexed to an estate tail, will not prevent the tenant in tail from making a valid conveyance in fee simple, in such method as the law has prescribed for that purpose (*m*). And under the Settled Land Act, 1882 (*n*), whereby tenants for life are enabled (subject to the provisions of the Act) to alienate the fee simple of the settled lands, any restriction on the exercise of this power of alienation is simply void (*o*).

Estates at will or by sufferance, however, are, of course, not alienable; and besides these, there were, at the common law, some few other interests which were incapable of transfer. For a man who had been ousted of the possession of his land by the wrongful act of a stranger,—and who therefore retained a *right of entry* only,—could not, in general, have conveyed that right to another (*p*); and the same law was applicable to the case of a *contingent* interest (*q*); but by the 1 Vict. c. 26, s. 3, both a right of entry and a contingent interest are made *devisable*; and by the 8 & 9 Vict. c. 106, s. 6, they may also be conveyed *inter vivos*, *i.e.*, *by deed*, the last-mentioned statute having provided, that, after the 1st October, 1845, a contingent, an executory, and a future interest (and a possibility coupled with an interest) in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained,—and also a right of entry, whether immediate or future, and whether vested or contingent, in or upon any tenements or hereditaments in England, of any tenure,—may be disposed of by deed (*r*). And we shall therefore now

(*l*) Co. Litt. 222 b, 223 a; *Rosher* v. *Rosher*, 26 Ch. Div. 801; *Kelly* v. *Elliot*, [1896] 2 Ch. 353.

(*m*) *Roe* v. *Galliers*, 2 T. R. 133; *In re Machu*, 21 Ch. D. 838; *Dugdale* v *Dugdale*, 38 Ch. Div. 176.

(*n*) 45 & 46 Vict. c. 38.

(*o*) Sect. 51.

(*p*) *Kennedy* v. *Lyell*, 15 Q. B. D. 491.

(*q*) *Goodtitle* v. *Morse*, 3 T. R. 371; *Right* v. *Bucknell*, 2 Barn. & Adol. 278.

(*r*) *Hunt* v. *Remnant*, 9 Exch. 635.

proceed to inquire, first, *who* may aliene, and to *whom*,—reserving for a subsequent chapter the consideration of the question *how* he may aliene. And in considering the question, who may aliene, and to whom, or, in other words, who is capable of conveying, and who of accepting such conveyance, we have to consider rather the incapacity than the capacity of the parties, all persons being *primâ facie* capable both of making and of accepting conveyances.

It is clear that *attainted* persons, though they might purchase lands, were at one period of our law disabled from holding them (*s*),—the lands so purchased being subject to escheat and forfeiture, as already explained; and attainted persons were also incapable, *from the time of the offence committed*, of conveying away their lands, so as to affect the crown or the mesne land,—*scil.*, because such conveyance might tend to defeat the crown of its forfeiture, or the lord of his escheat (*t*); but as regards the present state of the law, these positions require to be considered in connection with the modern statutes affecting escheat and forfeiture, which have been noticed in a former chapter.

In like manner, *corporations*, religious or other, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot in general retain such purchase, but it shall be forfeited to the lord of the fee,—unless, of course, in the excepted cases mentioned in the previous chapter. And as regards the power of *alienation* by corporations, they might in general, at the common law, make estates at their pleasure of any lands and tenements they held in their corporate right (*u*),—ecclesiastical corporations *sole* being, however, required to obtain certain consents, in order to make their alienations binding on their successors (*x*). But the powers of alienation belonging

(*s*) *Bullock* v. *Dodds*, 2 B. & Ald. 275.

(*t*) Co. Litt. 42 b; *Doe* v. *Pritchard*, 5 B. & Adol. 782.

(*u*) 2 Bl. Com. 318.

(*x*) *Colchester* v. *Lowton*, 1 Ves. & B. 226.

to ecclesiastical corporations are now regulated by a variety of Acts, of which an account will be given in that chapter of this work which treats of the endowments and provisions of the Church (*y*); and the powers of alienation belonging to *lay* corporations (being colleges or hospitals) are also now regulated by statute; and as regards such lay corporations as are *municipal* corporations (viz., incorporated towns), their powers of alienation were restricted by the 5 & 6 Will. IV. c. 76, by which Act (as slightly amended by the 6 & 7 Will. IV. c. 104) they were disabled from selling or mortgaging their lands (and, in general, also from demising them for any term exceeding thirty-one years,) except in pursuance of some agreement entered into by the body corporate before the 5th June, 1835, or else *with the approbation of the lords of the treasury*, or of any three of them; and by the 45 & 46 Vict. c. 50,—the Act which now regulates municipal corporations,—the like provisions have been re-enacted, that is to say:—By sects. 108, 109,—the town council may not, without the approval of the Treasury, sell, mortgage, or alienate any corporate property, unless pursuant to some enabling Act of Parliament; or, without such approval, lease the corporate property, save for a term not exceeding (in the general case) thirty-one years or (in exceptional cases) seventy-five years; but with such approval, may make any sale, mortgage, lease, or other alienation of the corporate property on terms approved by the Treasury, including (by sect. 111) leases for 999 years for workmen's dwellings; and (by the 51 & 52 Vict. c. 41, s. 72) the consent of the Local Government Board has now, in all these cases, been substituted for the consent of the Treasury. But by sect. 110, under any agreement for renewal in force on the 5th June, 1835, and binding on the corporation—or when there has been an established usage of renewal,—the town council may grant leases in renewal of existing leases on the old accustomed terms, or on

(*y*) *Vide post*, bk. IV. pt. II. ch. III.

such other terms as the corporation might have done if the Municipal Corporations Act, 1882, had not been passed (*z*).

The conveyances of *insane persons* (except during a lucid interval) are void (*a*), excepting that the feoffment of a lunatic is not absolutely *void*, but, owing to the solemnity of the livery, is voidable only,—the practical difference between a void and a voidable transaction being this, that the former is a mere nullity, and therefore incapable of confirmation, while the latter may be either avoided or confirmed *ex post facto* (*b*). The feoffment may be avoided (during the lunatic's life) by the person legally authorized to act for him, or (after the lunatic's death) by his heir, or any other person interested (*c*) ; but whether the lunatic may himself avoid his own feoffment, no man being allowed to stultify himself,—that is, to plead his own unsoundness of mind in a court of justice (*d*),—appears to be a little doubtful. The conveyance of an *idiot* is, of course, in all cases and at all times *void*. However, an *insane person* is competent to *purchase* (*e*), though he cannot be compelled to *retain* what he purchases, —the transaction (if found to be disadvantageous to him) being liable to subsequent avoidance on the ground of his insanity (*f*).

The conveyances and purchases of *infants*,—that is, of persons under twenty-one,—are in general not void, but

(*z*) As to the sale, by municipal corporations, of their church patronage, see 45 & 46 Vict. c. 50, s. 122, re-enacting the like provisions contained in 5 & 6 Will. 4, c. 76, s. 139 ; 6 & 7 Will. 4, c. 77, s. 26 ; c. 104, s. 3 ; and 1 & 2 Vict. c. 31 ; and as to grants, by corporations of seaport towns, of sites for Sailors' Homes, see 17 & 18 Vict. c. 104, s. 546 ; and as to grants by any municipal corporation of lands for public recreation or for playgrounds, see 22 Vict. c. 27, s. 3 ; or for school sites for the poor, see 4 & 5 Vict. c. 38 ; 12 & 13 Vict. c. 49 ; and 14 & 15 Vict. c. 24.

(*a*) *Thompson* v. *Leach*, Comb. 468.

(*b*) *Whelpdale's Case*, 5 Rep. 119 ; 2 Inst. 483 ; Moor, 43.

(*c*) 2 Bl. Com. 292.

(*d*) *Beverley's Case*, 4 Rep. 123 b ; *Stroud* v. *Marshall*, Cro. Eliz. 398.

(*e*) Co. Litt. 3 b.

(*f*) *Beaven* v. *M'Donnell*, 9 Exch. 309 ; 10 Exch. 184.

voidable, and may be avoided either by themselves in their lifetime, or by their representatives after their death (*g*); but if a voidable purchase has been confirmed by the infant on his coming of age, and he then dies, it cannot afterwards be impeached by his representatives, on the ground of its having been effected during infancy (*h*). And in this we are to be understood as speaking of *conveyances* strictly so called; for the *contracts* of an infant (unless for necessaries) are now, by the Infants' Relief Act, 1874, absolutely void in all cases, and are not confirmable by the infant, even upon his attaining full age (*i*).

[A *married woman*, both as regards her purchases and her alienations, was very peculiarly situated at the common law, peculiarities which have now, in great measure, ceased to exist: And firstly, as regards her *purchases*:—A married woman might *purchase* an estate without the consent of her husband; and the conveyance to her was good during the coverture, till the husband avoided it by some act declaring his dissent (*k*); and though he did nothing to avoid it, or even if he actually consented to it, the married woman herself might, after the death of her husband, have disagreed to the same; nay, even her heirs might have disagreed to it after her, if she died before her husband, or if (when she married her husband) she had done nothing to express her ratification of the transaction (*l*). Secondly, as regards her *alienations*:—Every alienation by a married woman was absolutely void, unless made in such particular method as the law specifically appointed for that purpose (*m*); and this was formerly by fine or recovery; but by the 3 & 4 Will. 4, c. 74, it was by deed executed with the concurrence of her husband and *acknowledged* by her, that

(*g*) *Zouch* v. *Parsons*, 3 Burr. 1794; Moor, 43; *Gibbs* v. *Merrill*, 3 Taunt. 307.

(*h*) 2 Bl. Com. 292; 2 Inst. 483; 5 Rep. 119.

(*i*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62).

(*k*) Co. Litt. 3 a.

(*l*) *Ibid.*

(*m*) 2 Bl. Com. 293.

[is to say, by deed acknowledged (*n*) ; and by the 8 & 9 Vict. c. 106, s. 7, a *disclaimer* by a married woman is likewise by deed acknowledged.

The case of an *alien* is peculiar ; for though he has always been able to acquire property of any description by purchase, yet after purchase he could not, at one time, *hold* any land, save only (if an alien *ami* and a merchant) a lease for years of a house ; for all other purchases, when found by an inquest of office, were immediately forfeited to the king, whether they had, in the meantime, been conveyed away by the alien or not (*o*) ; also, by the 32 Hen. VIII. c. 16, s. 13, a lease made to an alien *artificer* was absolutely void (*p*). Latterly, however, by the 7 & 8 Vict. c. 66, aliens might take and hold leases of lands for twenty-one years, provided they were for the purposes of trade or residence ; and now, by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), an alien, although being and remaining an alien, may not only acquire and hold real and personal property of every description in the same manner in all respects as a natural-born British subject, but may also as freely dispose of the same.

And in connection with the capacity or incapacity of *alienees*, it may be fit here to advert to the principle of our law, that no person can be compelled to take an estate by purchase against his will ; and if, therefore, land be conveyed *in invitum*, the effect of the conveyance may always be avoided, by the execution of a deed of disclaimer on the part of the dissentient alienee (*q*) ; but the heir-at-law, and he alone, may not disclaim ; that is to say, the heir as *heir* may not (although as *devisee* he may) disclaim ; and, of course, he may, even as *heir*, by any other mode of conveyance divest himself of the estate.

(*n*) 3 & 4 Will. 4, c. 74, ss. 77, 79, 91.

(*o*) 2 Bl. Com. 293 ; Anon., 4 Leon. 84.

(*p*) Co. Litt. 2 b ; *Lapierre* v. *M'Intosh*, 1 Per. & Dav. 629.

(*q*) *Nicholson* v. *Wordsworth*, 2 Swanst. 365 ; *Begbie* v. *Crook*, 2 Bing. N. C. 70.

A devisee of distinct estates, where the devises are for his own benefit absolutely, may, in general, disclaim one or more of the devises without disclaiming the others (*r*); but, as regards trust estates, there seems to be now some question, whether the trustee can disclaim one estate without disclaiming the others, or whether he can disclaim all the estates save one (*s*),—which partial disclaimer used to be a very usual thing, and more especially where the trust estates comprised lands of copyhold tenure (*t*).

(*r*) *Freke* v. *Calmady*, 32 Ch. D. 408; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511.

(*s*) *In re Lord and Fullerton*, [1896] 1 Ch. 228.

(*t*) *Lord Wellesley* v. *Withers*, 4 El. & Bl. 750.

CHAPTER XVI.

OF DEEDS.

BEFORE considering the divers modes of conveyance by which voluntary alienations may be effected,—that is to say, before considering the different species of *deeds*,—it is convenient to consider *deeds* themselves generally; and in treating of deeds generally, we shall consider, first, what a deed is; secondly, its requisites; thirdly, how it may be avoided; and lastly, the general rules for its construction.

[I. First, what a deed is:—A deed is a writing sealed and delivered; and a writing sealed and delivered is sometimes called a charter, *carta*, from its materials (*t*), although more usually,—and when applied to the transactions of private subjects, almost exclusively,—it is called "a deed," *factum*, par excellence, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, that is, shall not be permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed (*u*).] And for the same reason, when an engagement has been made by way of simple contract (that is, without deed), and afterwards the very same engagement is made between the same parties by deed, the first contract is merged in the second (*x*); also, a contract by deed is not

(*t*) Co. Litt. by Harg. 9 b, n. (1).

(*u*) Plowd. 434; Co. Litt. 260, 352 a; *Pargeter* v. *Harris*, 7 Q. B. 708; *De Mora* v. *Concha*, 29 Ch. D. 268.

(*x*) *Sharpe* v. *Gibbs*, 16 C. B. (N.S.) 527.

capable of being contradicted or explained by any other contract or declaration between the same parties, which is not itself also under seal (*y*).

If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and the deed so made is called an *indenture*, because the parts used formerly to be cut or indented in acute angles (*instar dentium*, or serrated) on the top, or side, to tally or correspond the one with the other or others (*z*). [At one time, too, when deeds were comparatively concise, and only two parts were required, it was usual to write both parts on the same piece of parchment, with some word (or letters of the alphabet) written between them; through which the parchment was cut, either in a straight or in an indented line, in such a manner as to leave half the word on one part and half on the other,—deeds so made being denominated *syngrapha* by the canonists (*a*), and with us *chirographa*, or hand-writings (*b*),—*sirographum* or *cyrographum*, being usually the word which was divided in the cutting;] and in the indentures of a fine, this custom continued to be observed until the abolition of that species of conveyance. But the practice of cutting through any word (or letters of the alphabet), and even of indenting saw-wise, fell into disuse; and no method of indenting is now necessary to the legal validity of any deed; and by the 8 & 9 Vict. c. 106, s. 5, a deed purporting to be an indenture, is to have the effect of an indenture though not actually indented. [When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are termed *counterparts* (*c*); though of late it is most frequent for all the parties to

(*y*) *Gwynne* v. *Davy*, 1 Man. & G. 857.

(*z*) Litt. s. 371; Co. Litt. 476, 229 a, n. (1).

(*a*) Lyndew. l. 1, t. 10, ch. 1.

(*b*) Mirrour, ch. 2, s. 27; Co. Litt. by Harg. 143 b, n. (4).

(*c*) *Burchell* v. *Clark*, 2 C. P. D. 88.

[execute every part,—which renders them all originals. A deed made by one party only, is called a *deed-poll* (*d*), such a deed having (in old times) been *polled* (*i.e.*, shaved even), and not indented.

II. Secondly, the requisites of a deed.—And of these, the first is, that there be persons able to contract and to be contracted with, for the purposes intended by the deed; and also a thing, or subject-matter, to be contracted for: and all these must be expressed by sufficient names (*e*). Thus, in every grant there must be a grantor, a grantee, and a thing granted; and in every lease, a lessor, a lessee, and a thing leased. And the second requisite is, that the deed must be *written* or *printed*, either upon paper or on parchment; for if on stone, board, linen, leather, or the like, it is no deed (*f*). A deed must be duly stamped; else it cannot, in general, be given in evidence (*g*).

And it is a third requisite, that the matter of the deed be *legally* and *orderly* set forth; and the formal and orderly parts of deeds having been settled by the wisdom of

(*d*) Mirrour, ch. 2, s. 27; Litt. ss. 371, 372; *Gardner* v. *Lachlan*, 8 Sim. 123.

(*e*) Co. Litt. 35 b.

(*f*) *Ibid.* 229 a; F. N. B. 122.

(*g*) The principal Act relating to the stamps on deeds is the Stamp Act, 1891 (54 & 55 Vict. c. 39); and by the 14th section of that Act, it is provided, that on the production of an instrument chargeable with any duty, as evidence in any court of civil judicature, if the instrument be one which may legally be stamped after execution, it may be received in evidence, saving all just exceptions on other grounds, on payment of the amount of the unpaid duty, and of the penalty payable by law on stamping after execution, and of a further sum of 1*l.*; and the penalty is fixed, by the 15th section of the Act, at the sum of 10*l.*, together with interest at 5*l.* per cent. on the amount of the unpaid duty where it exceeds 10*l.* There is also the Stamp Act, 1888 (51 Vict. c. 8), by which (sect. 18) it is provided, that the person by that Act made liable to pay the duty, if he neglects to pay same, forfeits 10*l.*, and in addition pays the above-mentioned penalty of 10*l.* and interest, and a further penalty equal to the amount of the stamp duty.

[successive ages, it is prudent not to depart from them without good reason or urgent necessity,—although they may not be, all of them, absolutely necessary (*h*) ; and therefore they shall be here mentioned in their usual order (*i*).

1. The *premises* set forth the number and names of the parties, with their additions or titles ; and, in the case of an indenture, the deed is always formally described as made *inter partes*, that is, as made between such an one *of the one part*, and such another *of the other part*. As to which, this distinction was formerly established, that one named as a party to an indenture could not covenant therein with a stranger (or person not named as a party), nor could the latter take an estate under the deed, except by way of remainder (*k*),—though a stranger might covenant with one who was a party, binding himself by executing the deed (*l*). But by the 8 & 9 Vict. c. 106, s. 5, an immediate estate and interest in any hereditaments, and the benefit of a condition or covenant respecting any hereditaments, may be taken, though the taker be not named a party to the deed. The premises also contain the *recitals*, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded ; and they set down the consideration upon which the deed is made ; and then follows the certainty of the grantor and grantee, and of the thing granted (*m*). And as regards the description of the thing granted, a conveyance of any *land* will

(*h*) Co. Litt. 6 a ; 225 a.

(*i*) Where the transaction is a purchase, the purchaser prepares the draft of the conveyance ; and when that draft is approved by the vendor, the purchaser also prepares an engrossment of the deed properly stamped, and sees to its due execution ; but where the transaction is a lease, the draft and engrossment, properly stamped, of the lease are usually prepared not by the lessee but by the lessor, although at the lessee's expense.

(*k*) *Reeves* v. *Watts*, Law Rep., 1 Q. B. 412.

(*l*) Co. Litt. 259 b ; *Berkeley* v. *Hardy*, 5 B. & Cress. 355.

(*m*) 2 Bl. Com. 298.

[suffice to pass also the structures or buildings thereon, as well as the mines thereunder ; but a conveyance of certain specified land, or of a certain house, (even adding the words *with the appurtenances*,) will not pass other land not specified,—although it may have been usually occupied together with the property conveyed ; unless indeed the land not specified should consist of the orchard, garden, or curtilage of the house conveyed,—in which case it would pass under a grant of the house with the *appurtenances*, or even under a grant of the house simply (*n*).

2, 3. Next come the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed (*o*) ; and when that is performed (and sometimes it is performed) in the premises, then the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to, the estate granted in the premises (*p*). As if the premises describe a grant to be "to A. and the heirs of his body," *habendum* "to him and his heirs for ever," or *vice versâ*,—here A. has an estate tail and a fee simple expectant thereon (*q*) ; but had the grant been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would have been utterly void,—for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it (*r*). The *tenendum* is now of very little use,—having been of use formerly to express the tenure by which the estate was to be holden ; viz. "*tenendum per servitium militare in burgagio, in libero socagio, &c.*,"—all which tenures having been now reduced to free and common socage, the tenure is never specified, excepting in the case of copyhold or customary-hold lands. Before the statute of *Quia emptores*

(*n*) Co. Litt. by Harg. 5 b, n. (1), 121 b ; *Hinchliffe* v. *Kinnoul*, 5 Bing. N. C. 1, 25 ; *Bolton* v. *Bolton*, 11 Ch. Div. 970.

(*o*) *Burchell* v. *Clark*, 2 C. P. D. 88.

(*p*) *Shaw* v. *Kay*, 1 Exch. 412.

(*q*) Co. Litt. 21 a ; 2 Roll. Rep. 19, 23 ; Cro. Jac. 476 ; *Goodtitle* v. *Gibbs*, 5 B. & Cress. 709.

(*r*) *Baldwin's Case*, 2 Rep. 23 ; *Earl of Rutland's Case*, 8 Rep. 56.

[(18 Edw. I.), the *tenendum* was also sometimes used to denote the lord of whom the land was holden ; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use also of the *tenendum* hath been antiquated,—though for a long time after we find it mentioned in antient charters, that the tenements shall be holden *de capitalibus dominis feodi* ; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use (*s*).

4. Next follows the *reddendum*, or reservation whereby the grantor doth create or reserve some new thing to himself out of what he had before granted (*t*),—as "rendering for the same, yearly, the sum of 10*s*.," or a peppercorn, or two days' ploughing, or the like. Under the pure feudal system, this return or rent consisted, in chivalry, principally of military services,—and, in villenage, of the most slavish offices ; but in socage, it has usually consisted of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed ; but if it be of antient services or the like, annexed to the land, then the reservation may be to the lord of the fee (*u*).

Next follows (when the grant so intends) the *condition*, or clause of contingency, on the happening of which the estate granted is to be defeated,—as "provided always, "that if the mortgagor shall pay the mortgagee 500*l*. "upon such a day, the whole estate granted shall "determine," and the like.]

6. As to the clause of *warranty* formerly inserted in conveyances, but now fallen into disuse (*x*),—By this

(*s*) Madox, Formul. *passim*.

(*t*) *Burchell* v. *Clark*, 2 C. P. D. 88.

(*u*) *Browning* v. *Beston*, Plowd. 132; *Whitlock's Case*, 8 Rep. 71.

(*x*) Co. Litt. by Butl. 365 a, n. (1), 373 b, n. (2).

[clause the grantor did for himself and his heirs "warrant" to the grantee the estate conveyed; and the origin of this practice seems to have been in the feudal constitution, whereby, if the vassal's title to enjoy the feud was disputed, he might "vouch," or call the lord or donor to warrant his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense (*y*); and, by the antient law, if a man enfeoffed another in fee (a mode of assurance analogous to the original feudal donation), the law annexed a warranty to the grant (*z*); and upon a partition or exchange of lands of inheritance, if either party or his heirs were evicted of his share, the other and his heirs were bound to warranty (*a*),—though, by the 8 & 9 Vict. c. 106, s. 4, there would now be no warranty either upon an exchange or upon a partition; also, upon a gift in tail (or lease for life rendering rent), the donor (or lessor) and his heirs were bound to warrant the title (*b*). But in other forms of alienation bearing no sort of analogy to the gift of a feud, no warranty whatsoever was ever held to be *implied*; and therefore it became necessary, in such cases, to add an *express* clause of warranty in order to bind the grantor and his heirs; and where the express clause was in fact superadded, it was held that this warranty not only bound the warrantor himself to protect the title of the warrantee, but that it also bound the heir of the warrantor to the same effect—provided he had other sufficient lands by descent from the warranting ancestor (*c*). And this was so, whether the warranty was *lineal*, or *collateral* to the title of the land,—*lineal* warranty being where the heir derived (or might by possibility have derived) his title to the land warranted, either from or through the ancestor who made the warranty—as where a father, or an elder son in the life of the father, released to the disseisor of either themselves

(*y*) 2 Bl. Com. 300; Feud. l. 2, t. 8 and 25.
(*z*) Co. Litt. 384 a.
(*a*) *Ibid.* 174, 384 a.
(*b*) *Ibid.* 384 b.
(*c*) Co. Litt. 102 a.

[or the grandfather, with warranty,—this was lineal to the younger; and *collateral* warranty being where the heir's title to the land neither was (nor could have been) derived from the warranting ancestor (*d*). And though the heir was only bound to insure the title of the grantee on his ancestor's warranty, provided he had assets, yet (whether assets descended or not) he was perpetually debarred from claiming the land *himself*. But warranties being found to produce, in individual instances, inconvenient results, divers statutes were from time to time passed to restrain their force (*e*); and the practice itself, of inserting any clause of warranty in deeds, fell by degrees into disuse.

7. A deed usually contains also *covenants*,—whereby either party stipulates for the truth of certain facts, or binds himself to do or to abstain from doing something, or to give something to the other. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like; or the grantee may covenant to pay his rent, or to keep the premises in repair, or not to use them in a certain manner, and the like.] By the common law, the use of the words "demise," "grant," or "give," raised an *implied* covenant on the part of the grantor for quiet enjoyment, &c.,—except so far as it might be controlled by some express covenant in the same deed (*f*); but (so far at least as regards the words "grant" and "give") the law on this head is now altered,—it having been enacted by the 8 & 9 Vict. c. 106, s. 4, that neither of those words in any deed executed after the 1st October, 1845, should imply any covenant, except so far as they might, by force of any *Act of Parliament*, do so (*g*).

A covenant gives to the covenantee and his represen-

(*d*) Litt. ss. 703, 705, 706, 707.

(*e*) 6 Edw. 1, c. 3; 11 Hen. 7, c. 20; 4 & 5 Ann. c. 3, s. 21; 3 & 4 Will. 4, c. 27, s. 39; c. 74, s. 14.

(*f*) Cro. Eliz. 674; *Merrill* v. *Frame*, 4 Taunt. 319; *Baber* v. *Harris*, 9 Ad. & El. 532; *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610.

(*g*) 8 & 9 Vict. c. 18, s. 132.

tatives, in case of its breach, a right of action for damages against the covenantor and his representatives ; and in a deed of *conveyance*, a covenant directly relating to the land conveyed will also, in general, *run with the land*,—that is to say, not only will the original parties or their representatives be, but each successive owner of the land will be, entitled to its benefit, or liable (as the case may be) to its obligation (*h*). It is consequently usual, so far as covenants for title are concerned, for the person who sells land which he himself has bought, to covenant only against his own acts ; or if he did not acquire the land by purchase, then to extend the covenant as far back as to the acts of the last buyer, but no further,—that being a sufficient security to the vendee, where all the former vendors have entered into a similar covenant,—*scil.*, because all these engagements run with the land, and consequently operate for his protection (*i*) ; but in the case of a mortgage, the mortgagor's covenants for title are not so limited, but are absolute ; and this distinction between the covenants of a vendor and the covenants of a mortgagor is preserved in the Conveyancing Act, 1881 (*k*), s. 7, by the effect of which, if the parties are expressed to convey respectively as beneficial owner, the respective covenants for title are implied (*l*) ; and the benefit of all such implied covenants runs with the land conveyed.

8. [Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed ; but a deed is good, although it mention no date, or hath a false or impossible date, as the 30th of February,—provided the real day of its execution can be proved (*m*).

(*h*) Shep. Touch. 161 ; *Spencer's Case*, 5 Rep. 16 a ; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403 ; *Austerberry* v. *Oldham* (*Corporation*), 29 Ch. Div. 750.

(*i*) *Browning* v. *Wright*, 2 Bos. & Pul. 22.

(*k*) 44 & 45 Vict. c. 41.

(*l*) *Page* v. *Midland Rail. Co.*, [1894] 1 Ch. 11.

(*m*) Co. Litt. 46 b ; *Styles* v. *Wardle*, 4 Barn. & Cress. 908.

[The fourth requisite to a deed is the *reading* of the deed,—which reading is necessary, when either of the parties desires it, but not otherwise ; and if it be not done, or if it be read falsely, on request, the deed is void as to him (*n*),—unless, indeed, it be so read by collusion on purpose to make it void, in which latter case it will be good (*o*).

The fifth requisite to a deed is, that the party, whose deed it is, should *seal* it (*p*), and (now, in most cases,) *sign* it also. Seals were in use among the Jews (*q*) ; and in the civil law, seals were required, on the part of the witnesses at least, at the attestation of every testament (*r*); but in the times of our Saxon ancestors, they were not much in use in England (*s*). For the method of the Saxons was for such as could write, to subscribe their names ; and for all parties (whether they could write or not) to affix the sign of the cross,—which custom the illiterate do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names ; and the Normans (a brave but illiterate nation), at their first settlement in France, used the practice of sealing only, without writing their names; and the charter of Edward the Confessor to Westminster Abbey is, in fact, witnessed only by his seal (*t*) : and upon the Norman Conquest, the Normans, bringing over into this kingdom their own fashions, introduced waxen seals only, instead of the English method of writing their names, and signing

(*n*) *Rex* v. *Longman*, 1 Nev. & M. 576.

(*o*) *Manser's Case*, 2 Rep. 3 ; *Pigot's Case*, 11 Rep. 27.

(*p*) Merely placing the finger on a seal or wafer already attached, is equivalent to sealing, and is the usual practice (Shep. Touch. 57) ; and there is indeed no necessity that there should be either wax or wafer, if only an impression be made on the parchment or paper, with the *intent* of sealing it. (*The Queen* v. *Trustees of Covent Garden*, 7 Q. B. 238, n.)

(*q*) 1 Kings, ch. 21 ; Daniel, ch. 6 ; Esther, ch. 8 ; Jer. ch. 32.

(*r*) Inst. 2, 10, 2 and 3.

(*s*) Palgrave, Eng. Com. ccxv. ; Co. Litt. 7 a.

(*t*) Lamb. Archeion, 51.

[with the sign of the cross (*u*). And in the reign of Edward the First, every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals (*x*),—the impressions of these seals being sometimes a knight on horseback, sometimes other devices, coats of arms not having been introduced till about the reign of Richard the First. And it eventually came to be the law with us, that sealing alone was sufficient to authenticate a deed ; and so the common form of attesting deeds,—"*sealed* and delivered,"—continues to this day. But the more usual form is "*signed*, sealed, and delivered,"—and that, because of a doubt suggested as to whether the Statute of Frauds (29 Car. II. c. 3), which requires writing to every "*contract or sale*" of lands, does not require signing also to every conveyance of lands,—and so to every deed (*y*).

The sixth requisite to a deed is, that it be *delivered* by the party himself or by his certain attorney ; which therefore is also expressed in the attestation, "sealed and *delivered*"; and, in practice, both sealing and delivering is held to be performed by placing the finger on the seal or wafer, at the same time uttering the words "I deliver this as my act and deed" (*z*). A deed takes effect only from this delivery ; for if the date be false or impossible, the delivery ascertains the time of it ; and if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (*a*). Moreover, a delivery may be either absolute,—that is, to the party or grantee himself ; or to a third person, to hold till some condition

(*u*) "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglid firmari solitam, in cæram impressam mutant, modumque scribendi Anglicum rejiciunt.*"—Ingulph.

(*x*) Stat. Exon. 14 Edw. 1.

(*y*) 2 Bl. Com. 306 ; 1 Shep. Touch. by Preston, 56 ; *Cooch* v. *Goodman*, 2 Q. B. 580, 597.

(*z*) *Talbot* v. *Hodson*, 7 Taunt. 251 ; *Fletcher* v. *Fletcher*, 4 Hare, 67 ; *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1046.

(*a*) Perk. § 130.

[be performed on the part of the grantee,—in which latter case, it is delivered not as a *deed*, but as an *escrow*; that is, as a scroll or writing, which is not to take effect as a deed till the condition be performed; and then it is a deed to all intents and purposes (*b*), and operates as from the date of the sealing and delivery (*c*).

Finally, a deed must in general be duly *attested*, that is, must show that it was executed by the party *in the presence of a witness or witnesses*,—though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the old feudal *brevia testata*, which were written memorandums introduced to perpetuate the tenor of the conveyance and investiture (*d*),—with which view the names of all the persons who attended as witnesses, and who heard the deed read, were inserted by the clerk or scribe in a sort of memorandum, thus:—"*hiis testibus Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis*" (*e*). This, like all other solemn transactions, was originally done only *coram paribus* (*f*), and frequently when assembled in the court baron, hundred court, or old county court,—which was then expressed in the attestation, *teste comitatu*, *hundredo*, *&c.* (*g*); and afterwards the attestation of other witnesses was allowed, the trial, in case of a dispute, being still reserved to the *pares*,—with whom the witnesses (if more than one) were associated and joined in the verdict (*h*), till that also was abrogated by the statute of York, 12 Edw. II. c. 2. And in this manner, with some such clause of *hiis testibus*, are all old deeds and charters,

(*b*) Co. Litt. 36 a; *Millership* v. *Brookes*, 5 H. & N. 797; *Kidner* v. *Keith*, 15 C. B. (N.S.) 35; *Watkins* v. *Nash*, Law Rep., 20 Eq. Ca. 262.

(*c*) *Frosel* v. *Walsh*, Bridg. Rep. 51; *Graham* v. *Graham*, 1 Ves. jun. 274.

(*d*) Feud. l. 1. t. 4.

(*e*) Co. Litt. 6 a.

(*f*) Feud. l. 2, t. 32.

(*g*) Spelm. Gloss. 228; Madox, Formul. Nos. 21, 322, 660.

(*h*) Co. Litt. 6 b.

[particularly *Magna Charta*, witnessed; and in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner (*i*). Nor was the clause of *hiis testibus* entirely discontinued in royal grants till the reign of Henry the Eighth (*k*) ; and that was also the era of discontinuing it in the deeds of subjects,—learning being then revived, and the faculty of writing more general ; and therefore, *ever since that time*, the witnesses have usually subscribed their attestations, either at the bottom or on the back of the deed (*l*).

III. How a deed may be avoided, or rendered of no effect.—And, firstly, if there be wanting any of the essential requisites before mentioned,—viz. 1, Proper parties, and a proper subject matter ; 2, Writing on paper or parchment ; 3, Sufficient and legal words, properly disposed; 4, Reading, (if desired) before the execution ; 5, Sealing, and by the Statute of Frauds, in most cases, signing also ; and, 6, Delivery,—the instrument is a void deed *ab initio*. Secondly, it may (having been once duly executed as a deed) be avoided by matter *ex post facto* : as, 1. By rasure, interlining, or other alteration in any material part,—unless indeed a memorandum thereof, properly attested, be made (and the rasure, interlining, or other alteration will *primâ facie* be assumed to have been made) prior to the execution of the deed itself (*m*). 2. By breaking off or defacing the seal (*n*). 3. By delivering up the deed to be cancelled, that is, scored across in the form of lattice-work (*cancelli*) or otherwise defaced (*o*). 4. By the disagreement of those whose concurrence is necessary in order for the deed to stand,—as of the husband, where a married woman is concerned ; or of an infant or person under

(*i*) 2 Inst. 77.

(*k*) Madox, Dissert. fol. 32.

(*l*) 2 Inst. 78.

(*m*) Com. Dig. Fait (F. 1); *Pigot's Case*, 11 Rep. 27; *Davidson* v. *Cooper*, 13 Mee. & W. 343; *Tatham* v. *Cattamore*, 20 L. J. Q. B. 364.

(*n*) *Matthewson's Case*, 5 Rep. 23.

(*o*) Vin. Abr. Faits (X. 2, 3, 4); *Todd* v. *Emly*, 11 Mee. & W. 4.

[duress, when the infancy has ended or the duress been removed ; and the like.

Deeds are also in some cases avoided upon objections relating to the *consideration* or want of consideration for the deed. And regarding the consideration of a deed, that may be either a *good* or a *valuable* one,—a good consideration being such as blood or natural love and affection,—as where a man grants an estate to a near relation from motives of generosity, prudence, and natural duty ; and a valuable consideration being such as money, marriage, or the like (*p*).] Deeds made without any consideration whatever, and also those made for good, though not for valuable, consideration, are said to be *voluntary* ; and by force of the statute 27 Eliz. c. 4, voluntary deeds of lands used to be void as against subsequent *bonâ fide* purchasers (*q*) from the donor of such lands ; but since the 56 & 57 Vict. c. 21, which came into force on the 29th June, 1893, such deeds if made without any actual fraudulent intent, although voluntary, are not now avoided by any such subsequent sale of the lands ; but (by 13 Eliz. c. 5) such deeds, whether of lands or of goods, are and continue void as against creditors, where the grantor is indebted to such creditors at the time, to the extent of insolvency (*r*). A deed is also liable to be impeached, if founded on an immoral or illegal consideration, or if obtained by fraud (*s*). But, in general, the efficacy of a deed to bind the parties thereto will not be prevented by the mere *want* of consideration, deeds being in this respect distinguished from simple contracts, that is, contracts not under seal, to the validity of which latter some consideration is essential ; but a writing sealed and delivered as a deed, is supposed by the law to be made with due

(*p*) *Twyne's Case*, 3 Rep. 83 ; 2 Rol. Abr. 779 ; Palm. 214.

(*q*) *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035.

(*r*) *Spirett* v. *Willows*, 3 D. J. & S. 303 ; *Freeman* v. *Pope*, Law. Rep., 9 Eq. Ca. 206.

(*s*) *Collins* v. *Blantern*, 2 Wils. 341.

deliberation, and to express fully and absolutely the intention of the party by whom it is executed; and he is therefore bound by its execution, whether he received a consideration for it or not (*t*); but by a *release*, a party may be discharged from the obligations even of a valid deed, such release being itself by deed (*u*).

IV. The construction of deeds.—The rules relative to the construction of deeds are principally as follows:—

1. A deed is to be expounded according to the intention,—where the intention is clear,—rather than according to the precise words used (*x*); for "*verba intentioni debent inservire*," and "*qui hæret in literâ, hæret in cortice.*" [Therefore by the grant of a remainder, a reversion may well pass, and *è converso* (*y*); and upon the principle, that "*mala grammatica non vitiat chartam*," neither false English nor bad Latin will destroy a deed (*z*).]

2. To explain an ambiguity in the language of a deed, no evidence *dehors* the deed itself is admissible (*a*),—*scilicet*, where the doubt arises merely from the failure of the parties to express their own meaning in proper terms; for if the law allowed the difficulty in such a case to be removed by extraneous evidence, it would introduce inconvenient laxity into the structure of deeds in general. But it is necessary to distinguish between *patent* and *latent* ambiguities (*b*),—the first being where the doubt arises upon the face of the instrument itself, and to these the rule applies; and the second being where the doubt is introduced by the existence of a fact not apparent on the face of the deed, and to these the rule has no application; and the reason for this distinction seems to be, that where

(*t*) Bac. Read. Uses, p. 79; *Pratt* v. *Barker*, 4 Russ. 507; *Hall* v. *Hall*, L. R., 8 Ch. App. 430.

(*u*) *West* v. *Blakeway*, 2 Man. & Gr. 729.

(*x*) *Chapman* v. *Dalton*, Plowd. 89; *Hasker* v. *Sutton*, 1 Bing. 500.

(*y*) Hob. 27.

(*z*) *Osborn's Case*, 10 Rep. 133.

(*a*) Bac. Max. Reg. 23; *Higgins* v. *Senior*, 8 Mee & W. 844.

(*b*) Bac. Max. Reg. 23; *Queen* v. *Wooldale*, 6 Q. B. 549.

the ambiguity itself is produced by circumstances extraneous to the deed, its explanation must of necessity be sought for through the same medium ; and so also, and for the same reason, evidence of usage *dehors* the deed is admissible for its due construction (*c*).

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains (*d*) ; and, *e.g.*, where general words follow upon an enumeration of particular things, they are to receive, in general, their full ordinary meaning, and are not to be restricted upon any principle of an *ejusdem generis* construction (*e*).

4. [The construction should be *favourable*, and such that "*res magis valeat quam pereat*" (*f*); and where the words will bear two senses, the one agreeable to and the other contrary to law, that sense shall be preferred which is agreeable to the law (*g*) ; *e.g.*, if tenant in tail grants a lease by the common law to have and to hold during life generally, it shall be construed to be a lease for the lessor's own life only,—for that stands with the common law; and not for the life of the lessee,—which is beyond his common law power to grant.]

5. When any thing is granted, the means necessary for its enjoyment are also granted by implication ; for it is a maxim that "*cuicunque aliquid conceditur, conceditur et id sine quo res ipsa esse non potuit*" (*h*). Thus, if a man conveys a piece of ground in the midst of his estate, a right of way to come to it, over the land not conveyed, will also pass to the grantee.

6. If there be two clauses in a deed so totally repugnant to each other that they cannot both stand together, the

(*c*) *Grant* v. *Maddox*, 15 Mee. & W. 745 ; *In re Wolverton Mortgage Estates*, 7 Ch. D. 197.

(*d*) 2 Bl. Com. 379.

(*e*) *Anderson* v. *Anderson*, [1895] 1 Q. B. 749.

(*f*) Plowd. 156 ; Shep. Touch. 82, 83 ; *Roe* v. *Tranmar*, Willes, 682.

(*g*) Co. Litt. 42 a.

(*h*) Shep. Touch. 89 ; *Liford's Case*, 11 Rep. 52 ; *Hinchliffe* v. *Kinnoul*, 2 Bing. N. C. 24.

first shall be received, and the latter rejected (*i*),—the opposite rule being applicable in the case of wills (*k*).

7. [Ambiguous words shall be taken most strongly against the grantor, "*verba fortius accipiuntur contra proferentem*" (*l*); but this rule does not apply to a grant by the Crown, at the suit of the grantee (*m*); also, the rule is never to be resorted to or relied upon, but where all other rules of exposition fail.]

(*i*) *Doe* v. *Leicester*, 2 Taunt. 113; *Doe* d. *Spencer* v. *Pedley*, Mee. & W. 677.

(*k*) Co. Litt. 1126; Plowd. 541.

(*l*) Bac. Max. Reg. 3; *Doe* v. *Edwards*, 1 Mee. & W. 556.

(*m*) Bac. Max. Reg. 3.

CHAPTER XVII.

OF ORDINARY CONVEYANCES—AND FIRST, OF THOSE AT THE COMMON LAW.

In the earlier times, and indeed down to the reign of Henry the Eighth, the chief distinction between conveyances was this, that they were either by matter of *record* or by matter *in pais*; and those which were *in pais* were conveyances of the ordinary class transacted between two or more persons *in pais* (*i.e.*, in the country), according to the old common law, and upon the spot; while on the other hand, those which were matter of *record* were (as the name denotes) effected by assurances in the superior courts of justice (*n*). But in and subsequent to the reign just mentioned, various Acts of Parliament have been passed, the effect of which has been to introduce from time to time new classes of conveyances, deriving their force and authority from the particular statutes; and, in discussing the general subject of conveyances, it is necessary to keep these distinctions in view, and for this purpose to subdivide conveyances by matter *in pais* into (1) Conveyances at *common law*, and (2) Conveyances *by statute law*.

Firstly, Conveyances at Common Law:—The first of these is *The Feoffment*, and a feoffment was for ages the only method of conveying the freehold of land in possession; and we shall proceed now to give some account of its nature and properties, although it has now fallen, in great measure, into disuse, having been almost entirely supplanted in fact by more modern forms of conveyance.

[A feoffment, then, is no other than the antient feudal donation, the aptest word of feoffment being "*do*," *give*, or

(*n*) 2 Bl. Com. 294.

["*dedi*," *given* (*o*); and the feoffment is still governed by the same feudal rules, the old rule, "*tenor est qui legem dat feudo*," which was applicable to the feudal grant, being applicable also to the feoffment,—for "*modus legem dat donationi*" (*p*); and therefore, as in pure feudal donations, the lord, from whom the feud moved, must have expressly limited and declared the continuance or quantity of the estate which he meant to confer, "*ne quis plus donasse præsumatur, quam in donatione expresserit*"; and if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee or feoffee hath barely an estate for life (*q*).

But by the mere words of donation the feoffment was by no means perfected, there remaining a very material ceremony to be performed, called *livery of seisin*, without which the transaction could not operate as a feoffment (*r*); which livery of seisin is no other than the pure feudal investiture, or delivery of the corporal possession of the land or tenement, which was held absolutely necessary to complete the donation,—"*nam feudum sine investiturâ nullo modo constitui potuit*" (*s*); and an estate was then only perfect in our law when, as the author of Fleta expresses it, "*fit juris et seisinæ conjunctio*" (*t*). And in ecclesiastical promotions where the freehold passes to the person promoted, corporal possession is required even to this day to vest the property completely in the new proprietor,—who, according to the distinction of the canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, until induction, *i.e.*, corporal possession (*u*).

The corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many

(*o*) Co. Litt. 9 a.
(*p*) Wright's Ten. 21.
(*q*) Co. Litt. 42 a.
(*r*) Litt. s. 70.
(*s*) Wright's Ten. 37.
(*t*) L. 3, ch. 15, s. 5.
(*u*) Decretal. l. 3, t. 4, ch. 40.

[cases antiently allowed ; for example, we find in the book of Ruth that among the Jews, a man plucked off his shoe, and gave it to his neighbour (*x*) ; and among the antient Goths and Swedes, the seller of land cast a clod into the extended cloak of the buyer, or delivered him a wand (*y*); and with our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands (*z*) ; and even to this day, the conveyance of a copyhold estate is usually effected by (or accompanied with) the seller's delivery of a rod or verge to the lord or his steward, who re-delivers the same to the purchaser.

Conveyances *in writing* were an improvement on this primitive mode of transfer ; and since the Statute of Frauds (29 Car. II. c. 3), s. 1, a feoffment has not been effectual unless evidenced by writing,—though the transaction derives its legal force from the livery, and not from the written instrument (*a*) ;] and now, by the 8 & 9 Vict. c. 106, s. 5, a feoffment made after the 1st October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced *by deed* ; but livery of seisin is even yet required to every valid feoffment.

[Livery of seisin may be either "in deed" or "in law." Livery in *deed* is, where the feoffor, or his attorney for the purpose, together with the feoffee, or his attorney, come to the land, or to the house ; and there, in the presence of witnesses, declare the contents of the feoffment or lease on which the livery is to be made ; and then the feoffor, if it be of land, doth deliver to the feoffee (all other persons being out of the ground) a clod or turf, or a twig or bough there growing, with words to this effect : "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed" ; or if it be of a house, the feoffor must take the ring or latch of the door (the house being quite empty of people), and deliver it to the feoffee in the

(*x*) Ruth, ch. iv., v. 7.
(*y*) Stiernhook, de Jure Sueon. l. 2, ch. 4.
(*z*) Hickes, Dissert. Epistolar. 85.
(*a*) Co. Litt. 48 a.

[same form, whereupon the feoffee must enter alone, and shut to the door, and then open it, and let in the others (*b*); and in all these cases it is prudent and usual to indorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it, together with the names of the witnesses (*c*).

Livery in *law* is where the same is not made on the land, but in sight of it only,—the feoffor saying to the feoffee, "I give you *yonder* land, enter and take possession"; and if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise.] By the antient law, indeed, if the feoffee dared not enter through fear of his life or bodily harm, his *continual claim*—made yearly in due form—would have sufficed without an entry (*d*); but now, by the 3 & 4 Will. IV. c. 27, s. 11, no right of entry or action is preserved by *continual claim*. Livery in law cannot be given by attorney, nor yet can it be accepted by attorney,—but only by the parties themselves (*e*).

[By feoffment, not only a fee simple may be conveyed, but an estate tail or an estate for life, these being all estates of freehold; but the *term* "feoffment" is considered as importing more properly a conveyance of the *fee simple*; while the conveyance of an *estate tail* is more technically called a *gift*; and that of an estate for life, a *demise* or *lease* (*f*).]

Up to a recent period the feoffment was distinguished from other conveyances by the following peculiarity, namely, that when made by a person in actual possession, it would always have the effect of passing to the feoffee a freehold, either by right or by wrong; for it was a delivery of the actual seisin, that is, of the actual possession, as for an estate of freehold, in fee, in tail, or for life,—

(*b*) Co. Litt. 48 a; West. Symb. 251.

(*c*) *Roe* v. *Rashleigh*, 3 Barn. & Ald. 156; *Doe* v. *Taylor*, 2 Nev. & M. 508.

(*d*) Co. Litt. 48 b; 2 Inst. 483.

(*e*) Co. Litt. 52 b.

(*f*) Litt. s. 59; Co. Litt. 9 a.

so that if the feoffor was himself lawfully seised to the full extent of the estate that he conveyed, a freehold as of right would pass ; but if he was not lawfully seised, or not lawfully seised to that extent, a freehold would still pass, though a freehold by *wrong* (*g*). And when by such means, or by any other, a wrongful or tortious freehold was created, the effect was, that the person lawfully entitled to the freehold in possession was *disseised* ; and if there was anyone entitled in reversion or remainder, such reversion or remainder was *displaced* or *divested*,—the party being in each case put to his *right of entry*, that is to say, being obliged to enter, and eject the wrong-doer, in order to revest his own estate (*h*) ; and when the tortious feoffment was by a tenant in tail in possession, the effect was a *discontinuance*, which deprived both the issue and the remainderman or reversioner even of their right of entry, leaving them nothing but a right of action (*i*) ; but all this doctrine, *so far as regards the operation of a feoffment by wrong*, is now abolished by the 8 & 9 Vict. c. 106, s. 4, which provides that "a feoffment made after the 1st October, 1845, shall not have any *tortious* operation."

II. [The second mode of Conveyance by the Common Law is *The Grant* ; and a grant is effected by mere deed, without livery of seisin, the deed containing words expressive of the intention to convey ; and the appropriate words are "*dedi et concessi*," "have given and granted," but any others of the like import will suffice (*k*). A grant was the regular method, by the common law, of transferring estates in expectancy (that is, reversions and remainders) in corporeal hereditaments (*l*) ; and the grant was appropriate also to the transfer (for whatever estate)

(*g*) *Fermor's Case*, 3 Rep. 77 ; Co. Litt. by Butl. 330 b, n. (1) ; 2 Sand. Us. pp. 18, 20.

(*h*) Co. Litt. 251 a ; *Focus* v. *Salisbury*, Hard. 401, 402.

(*i*) Co. Litt. 327 b.

(*k*) 2 Sand. Us. 47.

(*l*) Co. Litt. 172 a, 332 a, b.

[of hereditaments purely incorporeal—such as advowsons, commons, rents, and the like,—of which we are to treat hereafter. For it obviously results from the nature both of things incorporeal, and of corporeal things in expectancy, that no livery can be made of them,—not of the first, because they are not capable of possession ; nor of the last, because the possession is in the particular tenant, and not in the grantor ; for which reason they were formerly said to *lie in grant* ; while corporeal hereditaments in possession were said to *lie in livery* (*m*) ; and as the latter passed by force of the livery of seisin, so the former passed by force of the deed.] But the conveyance by grant is now made applicable to all kinds of hereditaments ; for by the 8 & 9 Vict. c. 106, s. 2, it is enacted, that, "after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery" ; and, indeed, the use of the word *grant* even is no longer necessary in any conveyance, the word *convey* being now made a sufficient equivalent in all cases (*n*).

III. [The third mode of Conveyance by the Common Law is the *Lease* ; and a lease is a conveyance by which a man grants lands or tenements (usually with the reservation of a rent) to another, for life, for years, or at will (*o*) ; and the estate so granted must be an estate short of the lessor's own estate in the lands (*p*) ; for if it be to the full extent of his estate, it is then properly an "assignment," and no lease (*q*).

A lease for *years* may be granted *in futuro* (*r*) ; but a lease for life, being for a freehold interest, could not be constituted by the common law without livery of seisin, and therefore could only be granted by feoffment (*s*) ;

(*m*) 2 Rep. 31 b ; *Doe* v. *Cole*, 7 Barn. & Cress. 243.

(*n*) 44 & 45 Vict. c. 41, s. 49.

(*o*) Litt. s. 58.

(*p*) Co. Litt. 43 b ; and Bac. Abr. "Leases and Terms of Years."

(*q*) 2 Bl. Com. 317.

(*r*) Co. Litt. 47 a.

(*s*) Litt. s. 59.

[but if the estate were for years, or at will, no livery was required (*t*). No writing was formerly essential to the efficacy of any lease,—unless, indeed, of an incorporeal hereditament (*u*); but by the Statute of Frauds, (29 Car. II. c. 3,) ss. 1, 2, all leases, with the exception of those not exceeding three years and with a rent of not less than two-thirds of the improved annual value, must have been put into writing and signed by the lessor or his agent lawfully authorized in writing ;] and, by the 8 & 9 Vict. c. 106, (sect. 3,) a lease, required by law to be in writing, of any tenements or hereditaments, made after the 1st October, 1845, shall be void at law unless made *by deed* (*x*). [Moreover the lease, even when created by deed, will not vest in the lessee a complete estate, until he has made *entry* on the land demised,—and in the meantime he takes but an *interesse termini* ; but where the lease is for years only, and is granted to take effect in possession at some future time, the lessee has of course no right to enter until that future time has arrived.

It is important to distinguish leases *in futuro* from mere *agreements to let* ; for an intending lessor may, without using such words as actually to divest himself of any interest present or future, simply engage to grant a lease at a future period ; and as no interest in the meantime passes, this will be a mere agreement, and no lease (*y*) ; and with respect to such agreements, the 29 Car. II. c. 3, s. 4, requires that even where the term agreed for is less than three years, they shall be in writing (*z*).

The usual words of operation in a lease are "demise, grant, and to farm let,"—*demisi concessi et ad firmam tradidi* (*a*). For *farm* or *feorme* is an old Saxon word

(*t*) Litt. s. 59.

(*u*) *Bird* v. *Higginson*, 6 Ad. & El. 824 ; *Rex* v. *Marquis of Salisbury*, 8 Ad. & El. 716.

(*x*) *Martin* v. *Smith*, Law Rep., 9 Exch. 50; *Hand* v. *Hall*, 2 Ex. D. 355.

(*y*) *Rollason* v. *Leon*, 7 H. & N. 73.

(*z*) *Edge* v. *Strafford*, 1 Tyrw. 293.

(*a*) Co. Litt. 45 b.

[signifying provisions (*b*) ; and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions—in corn, in poultry, and the like,—till the use of money became more frequent,—so that a farmer, *firmarius*, was one who held his lands upon payment of a rent or feorme ; though at present, by a gradual departure from the original sense, the word farm is brought to signify the very land so held upon farm or rent. Neither the words "to farm let," however, nor any of the others above specified, are necessary to effect a demise, any expressions sufficiently indicating the intention of one of the parties to divest himself of the possession, for a determinate period, in favour of the other, being clearly sufficient to constitute a lease (*c*).

With reference to the covenants contained in a lease, we may here observe, that it results from what has been before stated as to such as *run with the land*, that the lessee is liable not only to the original landlord or reversioner, but in case of the grant of the reversion, then to the grantee also, for the future performance of all such covenants contained in the lease, on the part of the lessee ; and is entitled, on the other hand, to enforce against the grantee, as well as the original landlord, the future performance of all such as are contained in the lease, on the part of the lessor (*d*). In order to improve the landlord's security, the lease usually contains also a proviso that, on breach of any of the covenants by the tenant, the landlord shall be at liberty to *re-enter*, and to resume possession of the premises as if no lease had been made ; and this proviso constitutes, in case of a breach of covenant by the tenant, a most advantageous addition to the landlord's remedies, which would otherwise be confined to a right of action for damages on the covenant.] But landlords now

(*b*) Spelm. Gloss. 229.

(*c*) *Poole* v. *Bentley*, 13 East, 168.

(*d*) *Thursby* v. *Plant*, 1 Saund. by Wms. 230 b ; *Wright* v. *Burroughes*, 3 C. B. 344.

pursue their remedies under this proviso, subject to (and first complying with) the provisions in this behalf contained in the Conveyancing Act, 1881, hereinafter more particularly dealt with.

IV. [The fourth mode of Conveyance by the Common Law is the *Exchange* ; and an Exchange is a mutual grant of equal interests, the one in consideration of the other ; and the word "Exchange" is so individually appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution (*e*). The estates exchanged must be equal in quantity, not of *value* (for that is immaterial), but of *interest*—as fee simple for fee simple, a lease for years for a lease for years, and the like (*f*) ; and no livery, even in exchanges of freehold, was, at the common law, necessary to perfect the conveyance (*g*),—for each party stood in the place of the other, and occupied his right, and each of them had already had corporal possession of his own land.] But by the Statute of Frauds, (29 Car. II. c. 3,) ss. 1, 3, an exchange was required to be in writing ; and by the statute 8 & 9 Vict. c. 106, s. 3, it must now be by deed, in every case except that of an exchange of copyhold.

[Moreover, by the common law, entry must have been made on both sides,—for if either party died before entry, the exchange was void for want of sufficient notoriety (*h*); and where two parsons, by consent of patron and ordinary, exchanged their preferments, and the one was presented, instituted, and inducted, and the other was presented and instituted, but died before induction,—the former was not entitled to keep his new benefice, because the exchange was not completed, and therefore he returned back to his own (*i*). And generally, if after an exchange of lands or

(*e*) Co. Litt. 50, 51 ; *Eton College* v. *Bishop of Winchester*, 3 Wils. 468.

(*f*) Litt. ss. 64, 65 ; Perk. sect. 275 ; 2 Shep. Touch. 296.

(*g*) Litt. s. 62.

(*h*) Co. Litt. 51 b.

(*i*) Perk. s. 288 ; *Downes* v. *Craig*, 9 Mee. & W. 166.

[other hereditaments, either party was evicted of those which were taken by him in exchange, through defect of the other's title, the party evicted had formerly a right to return back to the possession of his own, by virtue of the implied warranty contained in all exchanges;] but now, by the 8 & 9 Vict. c. 106, s. 4, an exchange of any tenements or hereditaments made by deed executed after the 1st October, 1845, shall not imply any condition in law.

The conveyance by exchange at the common law is now obsolete; and in lieu thereof the parties execute *mutual conveyances* of their respective lands, the one to the other; and what is above laid down, as to *exchanges*, has no application to such mutual conveyances (*k*); nor, of course, would it apply to exchanges effected under the provisions of Inclosure Acts (*l*).

V. [The fifth mode of Conveyance by the Common Law is the *Partition*; and a partition is where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands and to hold each a distinct part in severalty (*m*); and as they all originally hold *pro indiviso*, it is necessary that they shall all mutually convey and assure to each other the several estates, which they are to take and enjoy separately.] By the common law, coparceners might make partition by *parol* only, accompanied with livery; but joint-tenants and tenants in common could not make it otherwise than by *deed* (*n*); but under the Statute of Frauds (29 Car. II. c. 3), an instrument in writing, signed by the party or his agent, was made necessary in every case of partition by way of agreement (*o*); and by the 8 & 9 Vict. c. 106, s. 3, partitions

(*k*) *Eton College* v. *Bishop of Winchester*, 3 Wils. 491.

(*l*) 8 & 9 Vict. c. 118, ss. 92, 147; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 22 & 23 Vict. c. 43.

(*m*) Co. Litt. 165 b.

(*n*) 2 Bl. Com. 324.

(*o*) Co. Litt. by Harg. 169 a, n (4).

of all hereditaments (not being copyhold) made after the 1st October, 1845, shall be void at law, unless made not only in writing, but by deed.

The *five* conveyances which have now been considered are deemed of a *primary* character, while the *six* which remain are deemed of a *secondary* (or *derivative*) character, serving only to enlarge, or to confirm or restore, or to transfer or defeat, some interest which has been already created,—and these six are (1) the Release ; (2) the Confirmation ; (3) the Surrender ; (4) the Assignment ; (5) the Defeasance ; and (6) the Lease and Release ; and we shall consider each of them in their order.

VI. A Release is either the conveyance of an ulterior interest in lands or tenements to a particular tenant, or is the conveyance of an undivided share therein to the co-tenant, —(the relessee being in either case in privity of estate with the relessor,)—or it is the conveyance of the right to lands or tenements, to a person wrongfully in possession thereof (*p*). And every release was effected without livery of seisin, even though the interest conveyed were freehold ; for though the freehold in possession could not pass at common law without livery, yet where another person was already in the possession, a release to him by mere deed was always considered good (*q*) ; and the proper operative word to be employed is "*release*,"—a deed being in all cases required (*r*) ; but as regards a release of right, that may be *implied by law* from circumstances ; and when so implied, it may of course take place without a deed (*s*),—and in fact must do so.

There were five different ways in which a release might enure (or operate), that is to say :—

(1.) [By way of enlarging the estate, or *enlarger*

(*p*) Co. Litt. 264 a ; Hist. Eng. Law, by Reeves, vol. iii., p. 354.
(*q*) 2 Bl. Com. 325 ; Gilb. Ten. 53.
(*r*) Co. Litt. 264 b.
(*s*) *Ibid.*

[*l'estate*,—being the species of release that most frequently occurs ; and it consists of a conveyance of the ulterior interest of the remainderman or reversioner to the prior particular tenant,—as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives the latter the estate in fee. But to the validity of such releases as these, it is necessary that the estate of the relessee should be a *complete and vested* one (*t*) ; for if there be lessee for years, and, *before he enters and is in possession*, the lessor releases to him all his right in the reversion, such release is void,—and this because the lessee has, in such case, a mere *interesse termini*, and not an estate upon which a reversion can properly be expectant ; or, as is observed by Lord Coke (*u*), "before entry the lessee has "but *interesse termini* ; and therefore a release, which "enures by way of enlarging an estate, cannot work "without a possession,—for before possession, there is no "reversion. But if a man make a lease for years, with "remainder for years, and the first lessee doth enter, a "release to him of the remainder for years is good to "enlarge his estate." And further, there must be a *privity of estate* between the relessor and relessee ; that is, the one of their estates must be so related to the other as to make but one and the same estate at law,—as in the case where the ulterior estate conveyed is a reversion or remainder mediately or immediately expectant upon the particular estate of the relessee ; all which, in contemplation of law, form parts of the same estate, as being derived, at the same time, out of the same original seisin (*x*). Thus, if a man seised in fee make a lease for years, with remainder over for life, a release to the lessee for years is good,—for he hath both a privity and an estate ; and a release to him in the remainder for life, is good

(*t*) Co. Litt. by Butl. 270 a, n (3).

(*u*) Co. Litt. 270 a, 270 b.

(*x*) 2 Prest. Conv. 324 ; Gilb. Ten. 70, 71 ; *Goodright* v. *Forrester*, 1 Taunt. 602.

[also (*y*); but if A. makes a lease to B. for life, and B. makes a lease for years, and afterwards A. releases to the tenant for years, this release is void to enlarge his estate, because there is no privity between A. and B.'s lessee for years (*z*). And even a release to a tenant at will is good, because he has a sufficient estate for the purpose, and a privity with the lessor; but a release to a tenant at sufferance is void, because he has a possession without privity (*a*).

(2.) A release may enure by way of passing the estate, or *mitter l'estate*; as where one of two coparceners releases all her right to the other, this passeth the fee simple of the whole (*b*); or where one joint tenant releases to the other or others. But in this species of release, as well as in the former, there must be a privity of estate between the releasor and the releasee (*c*); and therefore one tenant in common cannot release to his companion, because they have distinct freeholds, and there is no necessary unity of title between them (*d*).

(3.) A release may enure by way of *passing a right*, or *mitter le droit*,—as if a man be disseised, and releaseth to the disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful (*e*).

(4.) A release may enure by way of *extinguishment*,—as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate (*f*).

(5.) A release may enure by way of *entry and feoffment*; as if there be two joint disseisors, and the disseisee releases

(*y*) Co. Litt. 273 a.
(*z*) *Ibid.* 272 b.
(*a*) *Ibid.* 270 b.
(*b*) *Ibid.* 273.
(*c*) *Ibid.* 273 b.
(*d*) Co. Litt. 200 b; Gilb. Ten. 74.
(*e*) Litt. s. 466.
(*f*) *Ibid.* s. 470.

[to one of them, he shall be solely seised, and shall keep out his co-disseisor; and this is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee (*g*).]

And note, that in all the four last-mentioned species of release, the fee may be conveyed by any of them without the use of words of inheritance (*h*); and in that respect, these four species of release differ from releases to enlarge the estate,—and indeed from feoffments also, and from grants; for as to all these latter, it is a general rule, that an estate of inheritance cannot be created without the word *heirs* (*i*), or the phrase *heirs of the body*, or (since the Conveyancing Act, 1881 (*k*)), the equivalent words "in fee simple" or "in fee tail."

VII. [A Confirmation is of a nature nearly allied to a release (*l*); and Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased (*m*); and the words of making it are these, "have given, granted, ratified, approved, and confirmed" (*n*). An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion; yet if the reversioner hath confirmed the estate of the lessee for years, *before the death of the tenant for life*, it is no longer voidable but sure (*o*). The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement. And it is to be observed that a confirmation (like a release, and for the same reason) has always been effectual without

(*g*) Co. Litt. 278 a.
(*h*) *Ibid.* 9 b.
(*i*) Litt. s. 1; Co. Litt. 8 b.
(*k*) 44 & 45 Vict. c. 41.
(*l*) Co. Litt. 295 b, 308 b.
(*m*) Co. Litt. 295 b.
(*n*) Litt. ss. 515, 531.
(*o*) Litt. s. 516.

[livery of seisin, even though a freehold estate be the subject (*p*). A deed is essential to the validity of a conveyance of this kind (*q*); though there may be a confirmation *implied by law* from circumstances, as well as a confirmation by deed (*r*).

VIII. A Surrender, (*sursum redditio*, or rendering up,) is of a nature directly opposite to a release; for as the release operates by the greater estate descending upon the less, a surrender is the falling of the less estate into the greater (*s*); and a surrender is defined as a yielding up of an estate for life or for years to him that hath the immediate reversion or remainder,—wherein, by mutual agreement between them, the particular estate may merge or drown (*t*); and accordingly, the surrenderee must have such an estate, that the estate surrendered may be capable of merging in it,—so that tenant for life, *e.g.*, cannot surrender to the remainder-man for years (*u*). A surrender is done by these words, "hath surrendered, granted, and yielded up," or the like (*x*). And though the estate surrendered were for life, there was not, at common law, any occasion for livery of seisin (*y*),—for there is a privity of estate between the surrenderor and the surrenderee, and livery having been once made at the creation of it, there is no necessity for having it afterwards.] Nor was either a deed or other writing required, at common law, to effect the surrender of land (*z*); but by the Statute of Frauds (29 Car. II. c. 3), s. 3, no lease (except of copyhold) shall be surrendered otherwise than by deed or note in writing, signed by the party or his agent lawfully authorized by

(*p*) 2 Bl. Com. 326.

(*q*) Shep. Touch. by Preston, vol. ii., p. 312.

(*r*) Co. Litt. 295 b; *Doe* v. *Jenkins*, 5 Bing. 469; *Doe* v. *Archer*, 1 Bos. & Pul. 531.

(*s*) Co. Litt. 373 b.

(*t*) Co. Litt. 337 b.

(*u*) Perk. s. 589.

(*x*) 2 Roll. Ab. 497.

(*y*) Co. Litt. 338 a; Shep. Touch. 307; *Sleigh* v. *Bateman*, Cro. Eliz. 487.

(*z*) Co. Litt. *ubi sup.*; Shep. Touch. *ubi sup.*

writing (*a*),—that provision not, of course, preventing a surrender without writing by *operation of law*; for a surrender, like a confirmation, may be implied by law from circumstances (*b*), *e.g.*, giving up a former lease (with the seals torn off it) to the landlord, in other words, the cancellation of the lease, would ordinarily imply a surrender thereof (*c*). And now, by the statute 8 & 9 Vict. c. 106 (s. 3), a surrender in writing of an interest in any tenement or hereditament,—not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st October, 1845, shall be void at law unless made not only in writing but *by deed*. [And note, that, upon a surrender, no entry is required to complete the title of the surrenderee,—so that if a tenant for life or years surrender at a place off the land, to him in reversion, and the latter agree to it, he has the land in him without further ceremony (*d*). And note also, that if a lessee for life or years make a lease for years, reserving rent, and *then* surrender his estate to his landlord, the estate for years made out of the estate so surrendered will continue notwithstanding the surrender,—although, by the common law, the under-tenant was, by such surrender, held discharged (in general) from the rent and other covenants of *his* lease,—the reversionary estate to which they were annexed having ceased to exist (*e*). And hence in the case of leases, surrendered for the purpose merely of being renewed, it was in the power of the under-lessees (by refusing to surrender, in their turn, notwithstanding they had covenanted to do so), greatly to prejudice their immediate landlords, the first lessees; and accordingly, by the 4 Geo. II. c. 28, it was provided, in

(*a*) *Roe* v. *Archbishop of York*, 6 East, 86; *Gore* v. *Wright*, 8 Ad. & El. 118.

(*b*) Shep. Touch. 301; Bac. Ab. Leases (S.) 3; *Nickells* v. *Atherstone*, 10 Q. B. 944.

(*c*) *Doe* v. *Thomas*, 9 Barn. & Cress. 288; *Lord Ward* v. *Lumley*, 5 H. & N. 87, 656.

(*d*) Shep. Touchstone, 307, 308; *Thompson* v. *Leach*, 2 Vent. 198.

(*e*) *Lord Treasurer* v. *Barton*, Moore, 94; *Webb* v. *Russell*, 3 T. R. 402.

[the particular case of a lease surrendered for the purpose of *renewal*, that the new lessee should (without a surrender of the under-lease) have the like remedy as to the rent and covenants, and the under-lessee should hold, as if the original lease had been kept on foot; also, that the chief landlord should have the like remedy, by distress or entry on the lands and hereditaments comprised in such under-lease, for the rents and duties reserved by the renewed lease (so far as they exceeded not those reserved by the original lease), as he would have had if such original lease had been kept on foot (*f*).] And under the 8 & 9 Vict. c. 106, s. 9, as was mentioned on p. 229, *supra*, when the immediate reversion on a lease for years is merged in the next ulterior estate, that ulterior estate becomes (for all the purposes of the lease) the immediate reversion on the lease.

IX. [An Assignment of land or real estate is properly a transfer, or making over to another, of a person's whole interest therein, whatever that interest may be; but it is more particularly applied to express the transfer of an estate for life or years; and an assignment for life or years differs from a lease only in this, that by a lease a man grants an interest less than his own, reserving to himself a reversion, whereas, by an assignment, he parts with the whole property, and the assignee consequently stands in the place of the assignor (*g*). Thus, where a lease is assigned, the assignee (as well as the lessee) is liable to the landlord or reversioner, for the future performance of the covenants of the lessee; and such assignee remains liable to the landlord as reversioner until he in his turn assigns over to another (*h*); and this liability attaches to him even without entry (*i*),—*scil.*, where the

(*f*) *Cousins* v. *Phillips*, 35 L. J. Ex. 84; and see (as regards *crown* lands) 8 & 9 Vict. c. 99, s. 7.

(*g*) 2 Bl. Com. 326.

(*h*) *Taylor* v. *Shum*, 1 B. & Pul. 21; *Barnard* v. *Godscall*, Cro. Jac. 309.

(*i*) *Williams* v. *Bosanquet*, 1 Brod. & Bing. 248.

[assignment is by deed; and conversely, the assignee is entitled to enforce against the reversioner any covenant of the lessor, which is incident to the relation of landlord and tenant; and in case the lessor conveys his interest to another, then to enforce it, also, against the assignee of the lessor, *i.e.*, against the grantee of the reversion (*k*). But if the transfer be for a single day short of the residue of the term, no liability or claim on the original covenants can arise between the transferee on the one hand, and the reversioner or the grantee of the reversion on the other hand,—for it is then an under-lease and no assignment; and the alienee, not coming precisely into the place of the alienor, is in no privity with the reversioner (*l*).

No deed or other writing was necessary, at common law, to the validity of an assignment (*m*),—though, in the case of a lease for life, it could not be effected without livery of seisin (*n*); but by the Statute of Frauds, (29 Car. II. c. 3,) the same provision as to the necessity of a written instrument was made, with respect to an assignment, as before mentioned in the case of a surrender;] and now, by the 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest (not being copyhold) in any tenements or hereditaments, made after the 1st October, 1845, shall be void at law, unless made not only in writing but by deed. [The proper operative words in an assignment are "assign, transfer, and set over"; but it may be effected by any words which are sufficient to express the intention (*o*); and words of purported assignment will be read as words of under-letting, and *vice versâ*, if and according as the intention of the parties will be effected thereby (*p*).

(*k*) 32 Hen. 8, c. 34; *Thursby* v. *Plant*, 1 Saund. by Wms. 230 b; *Wright* v. *Burroughes*, 3 C. B. 685.

(*l*) *Holford* v. *Hatch*, Doug. 182; *Baker* v. *Gostling*, 1 Bing. N. C. 19.

(*m*) *Noke* v. *Awder*, Cro. Eliz. 373, 436; Moore, 419, S. C.

(*n*) *Earl of Derby* v. *Taylor*, 1 East, 502.

(*o*) *Parminter* v. *Webber*, 8 Taunt. 593; *Hartshorn* v. *Watson*, 5 Bing. N. C. 477.

(*p*) *Poulteney* v. *Holmes*, 1 Stra. 405; *Beardman* v. *Wilson*, Law Rep., 4 C. P. 57.

X. [A Defeasance is a collateral conveyance, made at the same time with another conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*, or totally undone (*q*) ; and in this manner mortgages were in former times usually made ; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, *when executed at the same time with the original conveyance*, was considered as part of it by the antient law,—and, on that account only, was indulged (*r*) ; for a conveyance of the freehold, at common law, could not be defeated or recalled by a deed of defeasance executed *afterwards* ; and if such conveyance (being a conveyance by the common law) contained a proviso that it should be lawful for the grantor by subsequent act to revoke the same, the proviso was void for repugnancy (*s*). But things that were merely executory, or to be completed by matter subsequent,—as rents (of which no seisin could be had till the time of payment), annuities, conditions, warranties, and the like,—were always liable to be recalled by defeasances made subsequent to the time of their creation (*t*). Defeasances of land are now of rare occurrence,—the practice in modern times being (as in the case of mortgages) to include in the same deed both the conveyance of the land to the alienee, and the conditions (if any) to which it is to be subject, and by which its effect may be defeated.

XI. The common law conveyance termed a *Lease and Release* (*u*), obtained where one, desirous to convey in fee, first made a lease to the proposed alienee—for example, for one year—which demise, if perfected by actual entry,

(*q*) Co. Litt. 236 b.
(*r*) Co. Litt. 236.
(*s*) *Ibid.* 237 a.
(*t*) 2 Bl. Com. p. 327 ; Co. Litt. 237 a ; Co. Litt. by Butler, 237 a, n. (1).
(*u*) Hist. Eng. Law, by Reeves, vol. iii. p. 357 ; vol. iv. p. 356.

[conferred on him a complete leasehold estate (*x*) ; and the lessee then became capable of receiving a release of the reversion,—for he would be tenant of the particular estate on which that reversion was expectant ; and the next step therefore was to execute a release of the land to him and his heirs,—so that by the conjoint operation of the two conveyances he became, without livery of seisin, tenant in fee in possession, the release operating by way of *enlarging the estate* of the lessee.]

(*x*) 2 Bl. Com. 144.

CHAPTER XVIII.

OF CONVEYANCES UNDER THE STATUTE OF USES.

[SECONDLY, Conveyances by Statute Law :—We will firstly hereunder consider those conveyances which are founded on the Statute of Uses, that statute having had (and still having) a very extensive influence upon conveyances ; and there are *five* such conveyances, namely, (1) the Feoffment to Uses ; (2) the Covenant to Stand Seised to Uses ; (3) the Bargain and Sale ; (4) the Lease and Release ; and (5) the Grant to Uses.

I. A Feoffment to Uses :—This was simply the ordinary conveyance by the common law, with a limitation to uses superadded. Thus, if A. were desirous to convey to B. in fee, he might do so by enfeoffing a third person, C., (of course with livery of seisin,) to hold to him and his heirs to the use of B. and his heirs ; the effect of which was to convey the legal estate in fee simple to B. For the legal estate passed to C. by means of the livery, in like manner as it would have done before the statute ; but no sooner had this taken place, than the limitation to uses began to operate, and C. thereby became seised to the use limited ; the consequence of which was, that, by force of the statute, the legal estate was *eo instanti* taken out of C. and vested in B., for the like interest as was limited in the use, that is, in fee simple. B. thus became the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method, however, involving as it did the necessity of making livery of seisin, was never of frequent occurrence in modern practice (*y*).

(*y*) 2 Sand. Uses, p. 13.

II. [A Covenant to Stand Seised to Uses:—This was a conveyance (*z*) adapted to the case where a person seised of land in possession, or for a vested remainder or reversion, proposed to convey his estate to his wife, child, or kinsman (*a*); and in its terms it consisted of a covenant by the owner to stand seised to the use of the intended transferee (*b*). Before the Statute of Uses, this would merely have raised a use in favour of such party; but since that statute, the legal estate was transferred to him; for, the covenantor being by the effect of his covenant seised to the use of the covenantee, the statute immediately executed that use. But the conveyance in question was held to be ineffectual, unless the parties to it stood to one another in the relation of marriage or of near consanguinity; for no use was raised in contemplation of equity, in the case of a mere contract, unless such contract was founded on proper consideration, such as *natural affection*; and therefore, unless the parties were connected as above, there was no use for the statute to take effect upon (*c*). On account of inconveniences connected with this principle, and for other reasons, this species of conveyance became by degrees wholly laid aside (*d*).

III. A Bargain and Sale:—This was a conveyance adapted to the case where a person seised of land in possession, or for a vested remainder or reversion, proposed to convey it to some other person; and in its terms it consisted of a bargain and sale for money by the owner to the intended alienee. By the effect of the bargain and sale, the bargainor became seised to the use of the bargainee,—in fee, in tail, for life, or for years (according to the nature of the limitation); and this, before the statute,

(*z*) *Roe* v. *Tranmar*, Willes, 682; *Doe* v. *Davies*, 2 Mee. & W. 503.

(*a*) 2 Sand. Uses, pp. 34, 94.

(*b*) 2 Bl. Com. 338.

(*c*) 2 Sand. Uses, pp. 90, 94; Hist. Eng. Law, by Reeves, vol. iv. p. 162.

(*d*) 2 Fonb. Tr. Eq. 25; *Doe* d. *Starling* v. *Prince*, 10 L. J. (C. P.) 223.

[was the whole effect of the instrument; but afterwards the statute executed that use, and clothed the alienee with the commensurate legal estate. But as it was essential to the efficacy of a covenant to stand seised, that it should be made in consideration of natural affection, so it was requisite in the case of a bargain and sale, that it should be founded on *pecuniary* consideration,—for otherwise no use would be raised, and there would be nothing for the statute to operate upon.

And with respect to this conveyance, it is to be observed, that it possessed in a peculiar degree the recommendation to which we before adverted, of enabling parties to transfer a freehold without livery of seisin. For the covenant to stand seised could rarely be made available to the purpose, as it operated only between persons standing in particular relations to each other; but in the extensive class of conveyances which take place between seller and purchaser, a bargain and sale afforded the ready means of dispensing with livery of seisin and attornment; since by the insertion into the deed of a small sum of money, as the nominal consideration of a transfer, it was easy, even when the transaction was not really of the pecuniary kind, to obtain the benefit of this mode of conveyance (*e*). And not only the freehold in possession might be thus conveyed without livery, but a remainder or reversion might also be passed by the same method,—and that without *attornment* (*f*). But secret transfers of land being opposed to the policy of the law, the legislature, as soon as it perceived that these might be accomplished with facility by means of the bargain and sale, hastened to provide a remedy (*g*); and accordingly it was enacted, by the 27 Hen. VIII. c. 16 (called the Statute of Inrolments), that no bargain and sale should enure to pass a *freehold*, unless the same were by *deed indented*, and *enrolled* within six months after its

(*e*) 2 Sand. Uses, p. 41.

(*f*) 1 Saund. by Wms. 234 b, n. (4); *Shove* v. *Pincke*, 5 T. R. 124.

(*g*) 2 Sand. Uses, pp. 43, 44, 51; Bac. Use of Law; 2 Bl. Com. 338.

[date, in one of the courts of Westminster Hall,—or else with the *custos rotulorum* of the county, or with the proper officer of certain corporate towns (*h*).

A bargain and sale, it is to be observed, was also capable of conferring a complete estate for years, without entry,—a property that belonged not to a conveyance at common law ; for a common law lease for years gives no complete estate until entry has been made. It is, therefore, to be understood, that if a man bargained and sold his land for a term of years, the use thus raised was executed and became a complete estate for years, by force of the statute, without any additional ceremony; upon the same principle that a bargain and sale, in respect of a freehold interest, enured to pass the freehold, without livery of seisin (*i*) ; and the Statute of Inrolments had no application to bargains and sales for a mere term of years (*k*) ; and a bargain and sale for a term of years was therefore effectual without inrolment (*l*), differing, in this respect, from a bargain and sale for an estate of freehold.

No particular form of words was essential to the legal efficacy either of a bargain and sale or of a covenant to stand seised (*m*) ; and although "Bargain and sell" were the words of transfer ordinarily used in the one case, and "Covenant to stand seised" in the other, yet other words would have the same effect (*n*),—the distinctive character of each of these conveyances being determined by the consideration on which it was founded (*o*) ; but, of course, if the words employed were such as to indicate that there was no intention of transferring the property but that there was merely an engagement to convey by a future instrument, no use would arise, and consequently no estate would pass (*p*).

(*h*) 2 Sand. Uses, p. 41.
(*i*) *Barker* v. *Keate*, 2 Mod. 249 ; *Mallory's Case*, 5 Rep. 286.
(*k*) 2 Bl. Com. 338.
(*l*) *Ibid.*
(*m*) 2 Sand. Uses, pp. 56, 90 ; *Doe* v. *Davies*, 2 Mee. & W. 503.
(*n*) 2 Sand. Uses, p. 90.
(*o*) 2 Fonb. Tr. Eq. 47.
(*p*) 1 Sand. Uses, pp. 118, 120.

[The rule, which required a bargain and sale to be founded on pecuniary consideration, was held to be matter of form only, and to be sufficiently complied with if the conveyance *purported* to be founded on such a consideration ; and any trivial sum might be inserted (*q*) ; and it was immaterial whether the sum so inserted were actually paid or not (*r*).] But for the legal efficacy of this conveyance, it was required by the Statute of Frauds (29 Car. II. c. 3) to be in writing, and is required by the 8 & 9 Vict. c. 106 to be by deed.

IV. [A Lease and Release :—This conveyance consisted of two separate parts,—first, a bargain and sale, and secondly, a common law conveyance by release ; and, (like the bargain and sale,) it was adapted to the case where a person seised of land in possession, or for a vested remainder or reversion, proposed to convey his interest to another.

The conveyance by lease and release obtained occasionally at the common law ; and when the Statute of Inrolments rendered it impossible to effect a secret conveyance of the freehold, by the method of bargain and sale, the practitioners of the day invented for the purpose a new conveyance under the Statute of Uses analogous to the common law lease and release (*s*). Instead of a lease, the conveying party was made to execute a bargain and sale for some leasehold interest, for example, for the term of one year ; and this, without any inrolment, passed the legal estate for a year to the bargainee, (the Statute of Inrolments extending to freeholds only,) and the estate so transferred was complete without actual entry (*t*),—so that the transferee was capable of receiving immediately thereafter a release of the freehold and reversion (*u*) ; which release was

(*q*) 2 Sand. Uses, p. 54.
(*r*) Sugd. Gilb. 96.
(*s*) 2 Sand. Uses, p. 71 ; 2 Prest. Conv. 219.
(*t*) Sand. *ubi. sup.*
(*u*) Sand. *ubi. sup.* ; 2 Prest. Conv. 219.

[accordingly granted to him on the next day (*x*). This compound conveyance—which is said to have been invented by Serjeant Moore soon after the Statute of Uses (*y*)—was called, like its common law prototype, a lease and release,—though, properly speaking, it was rather a *bargain and sale* and *release*; and as it was competent to pass the freehold without livery of seisin, entry, or inrolment, or any other ceremony than the execution of the deeds themselves (*z*), and was in some other technical points more advantageous than a bargain and sale, it soon grew into common use (*a*),—and became so generally established as almost entirely to supersede every other method of conferring a freehold estate, whether at the common law or under the Statute of Uses. The lease (or bargain and sale) and the release, in practice, used always to constitute separate deeds, the former bearing date the day before the latter; but if comprised in the same deed, they were understood to be equally effectual (*b*);] and by the 4 & 5 Vict. c. 21, a release expressed to be made under that Act had the same effect as a lease and release; and on the release, some use was ordinarily engrafted; and if it was one to the relessee himself in fee, he took the legal estate as at common law; but if the use were declared to a third person, it was executed by the statute, and the legal estate passed accordingly to *him*.

V. A Grant to Uses:—By reason of the provision of the 8 & 9 Vict. c. 106, s. 2, to the effect that corporeal hereditaments "shall, as regards the conveyance of the "immediate freehold thereof, be deemed to lie in grant as "well as in livery," all conveyances of hereditaments, (whether corporeal or incorporeal, whether in possession or in expectancy, and whether for an estate of freehold or for an inferior estate,) may now be brought within the

(*x*) 2 Prest. Conv. 219.
(*y*) Hist. Eng. Law, by Reeves, vol. iv. p. 355.
(*z*) 2 Sand. Uses, p. 72.
(*a*) *Ibid.* p. 60.
(*b*) Sugd. Gilb. 229 (n.).

range of that common law conveyance discussed in the last chapter under the head of Grant; though, in its antient and proper application, the conveyance by Grant was confined to the transfer of *incorporeal* hereditaments and estates in expectancy. It is the practice of conveyancers to import into the grant of corporeal hereditaments limitations to uses; and a conveyance so framed (when the use is not limited to the grantee) takes effect under the Statute of Uses; for while the seisin to the use is created by force of the 8 & 9 Vict. c. 106, the use is converted into the legal estate by force of the 27 Hen. VIII. c. 10; and the operation is the same of a conveyance under the Conveyancing Act, 1881, which has made the use of the word "grant" unnecessary (*c*).

[And regarding all these conveyances under the Statute of Uses, it is, of course, necessary that all the circumstances required to bring the Statute of Uses into operation must be present: that is to say,—some use (either *in esse* or otherwise) must be raised, and some sufficient seisin to such use constituted by them; or, in the language of conveyancers, there must be a seisin proper to support or *serve* the use (*d*); and from this necessity of a seisin to a use it follows, that an existing term of years cannot be transferred by any method of conveyance depending on the Statute of Uses for its operation; for of a mere chattel interest there can be no seisin,—though the owner of the freehold may convey it by these methods, for a term of years; for he has a seisin out of which the use for the term may be served (*e*). For the same reason a corporation aggregate, it was supposed, could not aliene land by a conveyance under the Statute of Uses (*f*); for it was part of the antient doctrine with respect to uses, that such bodies as these could not be seised to any use but their

(*c*) 44 & 45 Vict. c. 41, s. 49.
(*d*) 2 Sand. Uses, p. 59; 1 Sand. Uses, pp. 97, 133, 140.
(*e*) 2 Sand. Uses, p. 59.
(*f*) 4 Cru. Dig. 175; Sugd. Gilb. 7, (n).

[own (*g*) ; and therefore, when corporations aggregate had occasion to make conveyances of their lands, the method adopted was commonly that of a feoffment,—or a lease with actual entry, followed by a release (*h*) ;] but of course a corporation, equally with an individual, can now make an effective conveyance whether for a freehold or for a leasehold interest, either by grant under the 8 & 9 Vict. c. 106, or by simple conveyance under the Conveyancing Act, 1881.

[The use which is required for the purpose of a conveyance under the Statute of Uses may be either *express* or *implied*. Thus, if A. convey by feoffment or by lease and release to B. in fee, without consideration, and without declaring any use, there will be a *resulting* use, by construction of law, to A. himself ; and such use the statute will execute accordingly (*i*).

A limitation of the legal estate by way of use is governed by the same principles that apply to the creation of estates by a common law assurance (*k*). Thus the word *heirs*, which used to be necessary, at common law, to create an estate of inheritance (*l*), was in like manner necessary in a conveyance to uses,—so that if a man bargains and sells to A., without adding *and his heirs* (or the now equivalent expression *in fee simple*), A. has only an estate for life (*m*). So an estate may be limited by way of use (as well as in a common law conveyance) in possession, in remainder, or in reversion (*n*) ; and, if in remainder, must be limited to take effect in possession immediately on the determination of the particular estate (*o*). So the remainder by way of use may be either vested or contingent (*p*) ; and (if

(*g*) *Vide sup.* p. 269.

(*h*) 2 Sand. Uses, p. 59 ; Sugd. Gilb. 7, n. (1).

(*i*) Co. Litt. 271 b ; 1 Sand. Uses, pp. 106, 109 ; *Doe* v. *Rolfe*, 3 Nev. & Per. 648.

(*k*) 1 Sand. Uses, pp. 123, 124 ; *Corbet's Case*, 1 Rep. 87 b.

(*l*) 2 Bl. Com. 109 ; *Nevell* v. *Nevell*, 1 Roll. Ab. 837.

(*m*) 1 Sand. Uses, p. 124.

(*n*) Sugd. Gilb. lvii., lviii.

(*o*) Sugd. Gilb. *ib.* 164.

(*p*) Sugd. Gilb. lviii. 153.

[contingent) is subject to the common law rule, that if it amount to a freehold, it cannot be limited on a particular estate less than a freehold (*q*). Legal estates created by way of use are also subject, in general, to the same incidents as if created by the methods of the common law (*r*) ; *e.g.*, where a particular estate was limited by way of use, it was formerly liable to forfeiture if the tenant made a feoffment for a larger estate than his interest warranted ; and if a contingent remainder was limited by way of use, and the particular estate was destroyed before the contingency happened, the remainder was defeated (*s*) ; however, the Contingent Remainders Amendment Act, 1877, applies equally to a remainder limited by way of use, as to a remainder limited at the common law.

But a limitation by way of use, although thus subject in general to common law principles, was, in other material particulars, allowed a greater latitude (*t*). For,—

1. By the common law, a man could not in any case be a purchaser, (that is, take an estate,) under his own conveyance,—for he could not, in the nature of things, unite the opposite capacities of grantor and grantee, feoffor and feoffee (*u*); but indirectly, and through the medium of a limitation to uses, it has always been practicable for a man to become a purchaser of his own estate (*x*) ; thus, A. may by feoffment, or lease and release, convey to a third person, C., to the use of himself, the grantor, for life, with remainder to the use of B., in tail or in fee ; or to the use of B. for life, with remainder to the use of himself, the grantor, in tail ; and in all these cases A. will take the legal estate by purchase accordingly (*y*). Yet if the remainder were to the use of himself in *fee*, he would not

(*q*) Sugd. Gilb. lviii., 164, 165.
(*r*) 1 Sand. Uses, p. 166.
(*s*) Sugd. Gilb. p. 298.
(*t*) 1 Sand. Uses, p. 130.
(*u*) 1 Sand. Uses, 131, 132 ; 2 Prest. Est. 20.
(*x*) *Pibus* v. *Mitford*, 1 Vent. 378 ; *Southcot* v. *Stowell*, 2 Mod. 210 ; Watk. Desc. 180.
(*y*) Co. Litt. by Harg. 13 a, n. (2) ; 1 Sand. Uses, p. 135 ; Sugd. Gilb. pp. 150, 151.

[at one time have taken by purchase,—at least not in such a sense as to have made himself a purchasing ancester, such a use having been considered as amounting only to the *old use in reversion*, so that it would have been converted by the statute into a legal estate in *reversion* (*z*); and such was the state of the law at the time of the passing of the Inheritance Act (3 & 4 Will. IV. c. 106); but that Act (sect. 3) has enacted, that "when any land "shall have been limited by any assurance, executed after "the 31st December, 1833, to the person or to the heirs (*a*) "of the person who shall thereby have conveyed the same "land, such person shall be considered to have acquired "the same as a *purchaser* by virtue of such assurance, "and shall not be considered to be entitled thereto as of his "former estate or part thereof." And just as a man could not, at the common law, convey to himself, so he could not convey to his wife, for she was considered as the same person with him (*b*); but the object was effected through the medium of a limitation to uses,—that is, by creating a seisin in another person, and declaring a use to the wife (*c*); and although, under the Conveyancing Act, 1881, a man may now convey freeholds directly to his wife, either alone or jointly with another or others (*d*), and may also convey freeholds directly to himself and another, still he cannot, under that Act, convey to himself alone,—otherwise than by means of a use.

2. At common law, a freehold could not be created to commence *in futuro*,—or, in other words, could not be limited to take effect at a future period, except by way of remainder upon some particular estate also passing at the same time out of the grantor; but this might be

(*z*) Co. Litt. 23 a; *Wood* v. *Douglas*, 28 Ch. Div. 327; *Moore* v. *Simkin*, 31 Ch. D. 95.

(*a*) A limitation by a man to his own heirs, is equivalent to a limitation to himself and his heirs; "for," says Lord Coke, "*hæres est "pars antecessoris.*" (Co. Litt. 22 b; 1 Vent. 378; 2 Bl. Com. 176; 1 Rep. 129 b, 130 a.)

(*b*) Co. Litt. 112 a; *Lucas* v. *Lucas*, 1 Atk. 271.

(*c*) 1 Sand. Uses, p. 132.

(*d*) 44 & 45 Vict. c. 41, s. 50.

[effectually done by a conveyance under the Statute of Uses,—for a use might be limited for any extent of interest to commence *in futuro*, and the statute transmuted such future interest into the legal estate (*e*). Thus, a man might covenant to stand seised in fee to the use of another (or bargain and sell to him in fee) seven years hence, and such conveyance would be effectual (*f*) ; or by feoffment, or lease and release, an estate might have been conveyed to A. and his heirs to the use of B. and his heirs, at the death of C. (*g*). A use thus limited *in futuro*, independently of any preceding estate, is sometimes called a *springing* use (*h*) ; and such use is also often described as an *executory* use,—because it is not executed by the statute until it comes into *esse* by the arrival of the period contemplated. Thus, in the two first examples, the whole fee would remain in the covenantor or bargainor, till the seven years expired (*i*) ; in the two latter, a use resulted to the feoffor or releasor, till the death of C. (*k*) ; but on these events happening, the so-called springing use would be executed, and the *cestui que use* would become clothed with the legal estate in fee.

3. By a common law conveyance, an estate could not be limited, upon a future event, to one person, in abridgment or defeasance of an estate of freehold, first limited to another (*l*),—in other words, *a fee could not be limited on a fee* (*m*). Thus, land could not be conveyed to B. in fee, or for life, with a provision that when C. returned from Rome, it should thenceforth immediately go over to C. in fee (*n*),—for this would have been to defeat the first estate by force of a condition, which could only be done by the entry of the grantor, or his heirs ; and the effect

(*e*) Sugd. Gilb. 161, (n).
(*f*) 1 Sand. Uses, p. 139.
(*g*) *Ib.* 140.
(*h*) Sugd. Gilb. 153.
(*i*) *Ib.* 156, (n.), 153, (n.).
(*k*) 1 Sand Uses, p. 140.
(*l*) Co. Litt. by Butl. 203 (b), n. (1) ; *Cogan* v. *Cogan*, Cro. Eliz. 360.
(*m*) Fearne, by Butl. p. 372 ; 1 Sand. Uses, p. 143 ; 2 Bl. Com. 173.
(*n*) Fearne, by Butl. pp. 14, 15.

of such entry would have been to destroy the second limitation as well as the first, and to have restored the grantor and his heirs to their former estate (*o*). But a use might always be made to shift, in this manner, from one person to another (*p*) ; and therefore, since the statute, land may be conveyed through the medium of a use, in like manner ; as by limiting it to A. and his heirs, to the use of B. and his heirs, with a proviso, that when C. returns from Rome, the land shall be to the use of C. and his heirs (*q*). A use so limited in derogation of a preceding estate, is called a *shifting* or *secondary* use (*r*) ; and this also is of the *executory* kind, the operation of the statute being suspended till the event arrives (*s*) ; and here we must observe, that there can be no fee simple limited after a fee simple, even under the Statute of Uses,—unless where the second fee simple be either in defeasance of the first fee simple, or be in the nature of an alternative limitation.

It was firmly settled, also, that no estate capable of being considered as a remainder (according to the rules by which remainders are limited) should ever be construed as a shifting or springing use (*t*),—a maxim which has now been slightly broken in upon by the enactment, that every contingent remainder created by any instrument executed after 2nd August, 1877, or by any will or codicil revived or republished by any will or codicil after that date, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the prior particular estate of freehold determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing

(*o*) Co. Litt. 379 a ; Litt. ss. 721, 722, 723.

(*p*) Sugd. Gilb. 153, 154, (n.) ; 1 Sand. Uses, p. 152.

(*q*) 1 Sand. Uses, p. 149.

(*r*) Sugd. Gilb. 152, (n.).

(*s*) Sugd. Gilb. 154, 155, (n.) ; 1 Sand. Uses, p. 144.

(*t*) 2 Saund. by Wms. 388 ; Fearne, by Butl. 393, 9th edit.

[or shifting use or executory devise or other executory limitation (*u*).

4. The grantor, in a common law conveyance, could not reserve to himself, nor confer on any other person, the power of revoking or altering the grant, by any future act or instrument,—for that was deemed repugnant to the conveyance itself (*x*) ; and the utmost that the common law allowed, was a deed of defeasance (coeval with the grant, and therefore esteemed a part of it) upon events specifically mentioned (*y*). But the limitation of a *use*, subject to a power of this description, was not considered as involving any repugnancy,—for a use was originally a mere direction to the trustee how he was to deal with the legal estate, and the direction might be recalled or changed (*z*) ; therefore, in a conveyance under the Statute of Uses, a proviso giving to the grantor, the grantee, or a stranger, authority to revoke or alter, by a subsequent act, the estate first granted, would be valid, being in effect no more than an authority to revoke the use first limited, and to declare a new one (*a*). Such provisoes are called *powers*,—a term properly applicable to *all* authorities, as distinguished from *estates* ; and such powers are either mere *powers of revocation*, enabling the grantor simply to recall what he has bestowed ; or they are *powers of revocation and of new appointment* (*b*), or of *appointment* simply (which imply in themselves a power of *revocation*),—authorizing the grantor, or some other person, not only to recall the estate first granted, but also to make a new disposition of the estate ; and such powers of revocation and of new appointment are of frequent occurrence in family settlements, their object being to carry into effect with greater convenience the arrangements actually contemplated. Thus, if a life estate be limited to the settlor, with remainder over, it is

(*u*) 40 & 41 Vict. c. 33.

(*x*) Co. Litt. 237 a ; 2 Bl. Com. 327, 335 ; 2 Fonb. 158, 159.

(*y*) 2 Bl. Com. 335.

(*z*) Sugd. Gilb. 158, (n.).

(*a*) *Ibid.*

(*b*) 1 Sand. Uses, p. 155 ; 4 Cruise, Dig. 228.

[common to insert a power enabling him from time to time to make effectual leases of the property in possession, for terms not exceeding twenty-one years,—a privilege reasonable and convenient in itself, but which (apart from statute) was not incident to the estate of a tenant for life generally. Of the same nature, in general, are the usual powers of jointuring, selling, charging land with the payment of sums of money, and the like (*c*); and all these are technically described as powers of revocation and of new appointment,—because, in authorizing a new disposition not made by the conveyance itself, they operate *pro tanto* as a revocation of those which it contains (*d*). Such a power, if closely considered, will be found to amount to an authority to create a use, to take effect in derogation, to a certain extent, of the uses first limited; or rather to the virtual limitation of an *executory* use of that description, in favour of such person, and for such estate, as shall be defined by the subsequent act of the donee of the power (*e*).

The subsequent exercise of the power is called an *appointment*; and its effect (when it correctly pursues the authority) is to raise, in favour of the appointee, a use corresponding to the estate appointed; which being served out of the original seisin, is immediately executed by the statute, and transmuted into the equivalent legal estate (*f*); and when the power is exercised by deed, the attestation of two witnesses is now in all cases sufficient (*g*). An appointment is not considered as an independent conveyance (*h*); but it is merely ancillary to the former deed; which (as already observed) contains, in effect, a prospective limitation of the new use; the appointee, therefore, is considered for most purposes as deriving his title under the original conveyance, and to be in the same

(*c*) 2 Sand. Uses, p. 81.

(*d*) 1 Sand. Uses, p. 155; 4 Cruise, Dig. 228.

(*e*) Sugd. Gilb. 152, 153, (n.); 2 Sand. Uses, p. 81.

(*f*) 2 Sand. Uses, p. 82; 4 Cruise, Dig. 228.

(*g*) 22 & 23 Viet. c. 35, s. 12.

(*h*) 2 Sand. Uses, p. 84.

[position as if that instrument had actually contained a limitation in his favour, to the extent of the estate appointed (*i*). And with regard to such powers generally, the Conveyancing Act, 1881 (*k*), sect. 52, enables the donee of the power, whether coupled with an interest or not, to release the power by deed, or by deed to contract not to exercise the power ; and the Conveyancing Act, 1882 (*l*), sect. 6, enables him to disclaim the power.

Not only as to the limitation of estates, but in other particulars, there are differences between conveyances to uses, and conveyances at common law. The possession was indeed given by the conveyance to uses quite as effectually as if the alienee had received livery of seisin, or had made actual entry (*m*) ; but as the conveyance to uses, *e.g.*, a bargain and sale, conveyed the possession by construction of law only, so it differed from a feoffment, in such incidents as resulted from delivery of possession in point of fact. Therefore, though a feoffment, when made by the tenant in actual possession, was capable of passing a wrongful estate of freehold, and, when made by a particular tenant for a greater estate than he could lawfully convey, occasioned a forfeiture (or, in the case of a tenant in tail, a discontinuance) of the particular estate, and the contingent remainders dependent on that estate used to be defeated,—no such results followed from any conveyance by way of use (*n*). For by the feoffment, there was an actual investiture of the possession, as for an estate of freehold,—which, it was held, must take effect either *de jure* or *de facto* ; but conveyances by way of use could, in their nature, pass no more than the grantor might lawfully transfer (*o*) ; and they received accordingly the appellation

(*i*) 4 Cruise, Dig. 282, 497 ; *Bringloe* v. *Goodson*, 4 Bing. N. C. 734 ; Sugd. on Powers, p. 470.
(*k*) 44 & 45 Vict. c. 41.
(*l*) 45 & 46 Vict. c. 39.
(*m*) 2 Sand. Uses, p. 52.
(*n*) 2 Sand. Uses, p. 73.
(*o*) Fearne by Butler, p. 322 *Smith* v. *Clyfford*, 1 T. R. 744.

[of *lawful* or *innocent* conveyances (*p*); but since the statute 8 & 9 Vict. c. 106, s. 4, this distinction has so far lost its importance.

The Statute of Uses, while it thus enabled owners to dispose of their lands in methods more suitable to the exigencies of social life, opened the door at the same time to inconveniences of a different description, and which the policy of the law thought fit to regulate by the rule (called the Rule of Perpetuities) against the creation of too remote limitations; and this rule we shall now proceed to explain (*q*). We have seen as regards remainders, that even under a strict settlement, an estate tail could not, after *Taltarum's Case*, be preserved from alienation longer than during the life of the taker of the first estate of freehold, and the nonage of the tenant in tail next in remainder,—for on attaining the age of twenty-one, the latter was competent, with the concurrence of the former, to suffer a recovery; and by analogy to that limit (*r*), and as regards executory interests, and springing or shifting uses, it was settled that an estate limited by way of executory use must vest within, at the latest, some life or lives in being, and twenty-one years afterwards (*s*). And if a man be seised in fee of lands, and gives them to the first son of J. S. that shall attain the age of twenty-one years,—here the estate vests, at the latest, on the expiration of J. S.'s life and the infancy of his son,—which infancy, generally speaking, will not endure, at the latest, beyond twenty-one years after J. S.'s death; but if the son is born *posthumously* it will endure a short further time, namely, the time of gestation *in utero* which follows upon J. S.'s death. Also, when the period at which the estate is limited

(*p*) Fearne by Butler, p. 322; *Smith* v. *Clyfford*, 1 T. R. 744.

(*q*) Co. Litt. by Butler, 379 b, citing 327 a; Hist. Eng. Law, by Reeves, vol. iii. p. 324; *Cadell* v. *Palmer*, 10 Bing. 140; *Tollemache* v. *Lord Coventry*, 8 Bligh (N.S.) 547; *Monypenny* v. *Dering*, 16 Mee. & W. 418.

(*r*) Co. Litt. by Harg. 20 a; note (5).

(*s*) 2 Bl. Com. 174; *Cadell* v. *Palmer*, 10 Bing. 140; S. C. 7 Bligh (N.S.) 202.

[to vest comprises no life or lives in being, it is not allowed to exceed twenty-one years from the time when the limitation is created (*t*),—together with, of course, the period of gestation, if any. And the law so much abhors a perpetuity (*u*), that any limitation, either for a legal or for an equitable interest, by way of executory use, or otherwise, of such a nature as to lead to the possibility, if it were allowed, of exceeding the limit of time prescribed by this "Rule of Perpetuities," as it is called, is absolutely void (*x*). And the rule applies also to terms of years and to pure personal property (*y*) ;] and in furtherance of the rule, it has been enacted by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10, with regard to instruments coming into operation on or after the 1st January, 1883, that an executory interest, in *lands*, to take effect in default of issue, or on failure of the issue, of the tenant of the executed estate, shall become void as soon as any of such issue attains the age of twenty-one years.

In connection with the Rule of Perpetuities, the law limiting the Accumulation of Income may also properly be considered ; for, in the case of Mr. Thellusson's will (*z*), where there was a direction, that the income of the testator's property should be accumulated during the lives of all his children, grandchildren, and great-grandchildren, living at the time of his death, and the lives and life of the survivors and survivor of them, for the benefit of descendants living at the death of the survivor, the court held that the direction (seeing that it kept well within the rule of perpetuities) was valid ; but the legislature thought expedient to put a check, for the future, on dispositions of that description (*z*) ; and by the 39 & 40 Geo. III. c. 98, commonly called the Thellusson Act, it was enacted, that no such accumulation

(*t*) *Palmer* v. *Holford*, 4 Russ. 403.

(*u*) 10 Rep. 113 b.

(*x*) *Cadell* v. *Palmer*, *ubi sup.* ; *Gilbertson* v. *Richards*, 5 H. & N. 453.

(*y*) *Atkinson* v. *Hutchinson*, 3 P. Wms. 262.

(*z*) Fearne, by Butler, p. 436 (n.).

should be allowed for a longer term than the life of the grantor, *or* twenty-one years from the death of the grantor or testator, *or* during the minority of any person living or *in ventre sa mère* at the death of such grantor or testator, *or* during the minority only of any person who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated : and, further, that where any accumulation was directed contrary to the Act, such direction (if it specified a time that would be in excess of the limit prescribed by the rule of perpetuities) should be totally void ; and (if it expressed a time that would not be in excess of that limit) should be void for the period which was in excess of the limit prescribed by the Thellusson Act ; and in the latter case, the income during the time the property is directed to accumulate contrary to the Act, is directed to go to such person as would have been entitled thereto, if no such accumulation had been directed (*a*) ; but the Act does not extend to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of wood or timber (*b*). Also, by the Accumulations Act, 1892 (*c*), which came into force on the 28th June, 1892, no person may now settle any property in such manner as that the rents or income thereof (or any part of such rents or income) shall be accumulated, for the purchase of *land* only, for any longer period than during the minority of the person entitled to the land to be purchased.

(*a*) *Curtis* v. *Lukin*, 5 Beav. 147 ; *Jagger* v. *Jagger*, 25 Ch. Div. 729.

(*b*) *Halford* v. *Stains*, 16 Sim. 488 ; *Edwards* v. *Tuck*, 3 De Gex, M. & G. 40 ; *Matthews* v. *Keble*, Law Rep., 3 Ch. App. 691.

(*c*) 55 & 56 Vict. c. 58.

CHAPTER XIX.

OF CONVEYANCES BY TENANTS IN TAIL, AND BY MARRIED WOMEN.

CONVEYANCES by tenants in tail and by married women may properly be considered by themselves as a separate class of conveyances; for as regards a tenant in tail, although he has an estate of inheritance, yet by none of the conveyances hitherto examined, unaccompanied by the solemnities to be presently referred to, can any indefeasible interest be granted by him (apart from statute) beyond the period of his own life; and as regards married women, particular solemnities have also been appointed for the alienation by them of their lands and tenements,—other than, of course, their separate estates (*d*).

The law relative to the conveyances of tenants in tail and of married women is now principally contained in the 3 & 4 Will. IV. c. 74, whereby simpler modes of assurance have been substituted for the old Fines and Recoveries which were in use by tenants in tail, and for the old Fines which were in use by married women; and Fines and Recoveries are, for the future, abolished by the Act,—but it is necessary still to know something of their nature, and also what was their precise operation.

Fines and recoveries were (as were in the nature of) conveyances by matter of record; and, although latterly they were merely fictitious suits, still they were originally actual suits commenced, in the Court of Common Pleas, for the recovery of the possession of the land (*e*).

(*d*) 2 Bl. Com. 292; Co. Litt. y Harg. 112, n. (6).

(*e*) 2 Bl. Com. 349, 357.

And, first, of *Fines*.

[Fines were so called, because they put an end, not only to the suit then commenced, but also to all other suits and controversies concerning the same matter (*f*). They were assurances of equal antiquity with the first rudiments of the law itself (*g*); and the statute 18 Edw. I., called *Modus levandi Fines*, only declared and regulated the manner in which they should be levied.]

Now the mode of levying a fine was as follows: (1.) The party to whom the land was to be conveyed commenced an *action* at law against the intended vendor, by suing out a writ denominated, from its initial words, a writ of *præcipe quod teneat* "*conventionem*,"—the foundation of which was a supposed agreement or covenant ("*conventio*"), that the defendant should convey the lands to the plaintiff, and for the breach of that agreement the action was brought. The suit being thus commenced, then followed, (2.) The *licentia concordandi*, or leave to agree the suit; which leave was readily granted (*h*). (3.) Next came the *concord*, or agreement itself, after leave obtained from the court; and this was usually an acknowledgment from the deforciant (*scil.*, defendant) that the land in question was the plaintiff's; and from this recognition or acknowledgment of the plaintiff's right, the party levying the fine was called the *cognizor*, and he to whom it was levied was called the *cognizee*. The acknowledgment was made in open court, or else before one of the judges, or (in the country) before two or more commissioners empowered by a special authority, called a writ of *dedimus potestatem*; and the judges and commissioners were required by the 18 Edw. I. to take care that the cognizors were of full age, sound memory, and out of prison; and if there were any feme covert among the cognizors, she was to be privately examined, whether she did it willingly and freely, or by

(*f*) 2 Roll. Abr. 13.

(*g*) Glan. l. 8, ch. 1; Br. l. 5, t. 5, ch. 28, s. 7; Plowd. 369; 2 Inst. 511.

(*h*) 5 Rep. 39; 2 Inst. 511; stat. 32 Geo. 2, c. 14.

compulsion of her husband. Those three matters, namely, the writ, the licence, and the concord, completed the fine (*i*),—the court fees payable thereon having been the *minor fine* on the writ, and the *first fine* on the licence ; but there required to be added (by way of evidence of the fine having been levied) the two following subsidiary parts, namely:—(4.) The *note* of the fine, which was only an abstract of the writ and of the concord, parcels, and the agreement,—which (by the 5 Hen. IV. c. 14) was to be enrolled of record in the proper office ; and (5.) The *foot* of the fine, or conclusion of it, which usually commenced with the words "*Hæc est finalis concordia*," and which contained the whole of the proceedings ; and of this conclusion, there were indentures made and engrossed at the chirographer's office to be delivered to the cognizor and the cognizee ; and by the 4 Hen. VII. c. 24, the fine was openly and solemnly read and *proclaimed* in court sixteen times,—viz., four times in the term in which it was made, and four times in each of the three succeeding terms ; and these proclamations (which were afterwards reduced to one in each of the four terms) were indorsed on the back of the record (*k*).

Fines thus levied were of four kinds :—1. The fine *sur cognizance de droit come ceo que il ad de son don*,—being the highest species of fine, and the deforciant thereby acknowledged in court a former feoffment ("*don*") to have been made by him to the plaintiff ; and this fine was therefore said to be a feoffment of record. 2. The fine *sur cognizance de droit tantum*, being the fine which was commonly used to pass the *reversionary* interest of the cognizor ; for of such reversion there could be no feoffment ("*don*") (*l*) ; and it was worded in this manner, "that the cognizor acknowledges the right to be in the cognizee, and grants for

(*i*) *Price* v. *Davies*, Comb. 71.

(*k*) By 11 & 12 Vict. c. 70, all fines theretofore levied in the Court of Common Pleas are *deemed* to have been levied with proclamations.

(*l*) *Danver's Case*, Moore, 629.

"himself and his heirs, that the reversion, after the par-"ticular estate determines, shall go to the cognizee" (*m*). 3. A fine *sur concessit*, which was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed compromise,—and this might be done, reserving a rent or the like, for it operated as a new grant (*n*). 4. The fine *sur don grant et render*, which was a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.*, and the fine *sur concessit*; and it was used to create particular limitations of estates (*o*), the cognizee, after the right was acknowledged to be in him, granting back again to the cognizor, or perhaps to a stranger, some other estate in the premises.

The effects of a fine were principally as follows:—

1. Like all other conveyances, a fine bound the *parties* thereto, and also all "*privies*," that is, persons deriving title under the parties; and this, whether levied with proclamations or not (*p*); and even if one of the parties thereto was a married woman, she would still be bound by the fine; and (supposing her husband to concur in it) it would effectually pass any estate, or bar any right of dower, that she might have in the lands therein comprised (*q*),—which peculiarity was justified by the circumstance that the court would not allow a fine, affecting a married woman's interest, to pass without privately examining her as to her voluntary consent.

2. A fine with *proclamations* bound not only parties and privies, but even *strangers*, if they failed to put in their claims within the time allowed by law, and were during all that period subject to no legal disability sufficient to excuse their acquiescence (*r*); and it was in reference to

(*m*) West Symb. p. 2, s. 95.
(*n*) Burt. Compend. 24.
(*o*) *Hunt* v. *Bourne*, Salk. 340.
(*p*) 2 Bl. Com. 355; *Hunt* v. *Bourne*, Salk. 340; *Doe* d. *Thomas* v. *Jones*, 1 Tyrw. 517.
(*q*) 5 Cruise, Dig. 82, 154, 156.
(*r*) 2 Bl. Com. 354.

this property of a fine, that rights are said in our books to be barred *by fine* and *non-claim* (*s*) ; and by the 4 Hen. VII. c. 24 (*t*), when the fine was duly *proclaimed*, the rights of all strangers were bound, unless they made claim by way of action, or lawful entry within five years after proclamations made (*u*),—femes covert, infants, prisoners, persons beyond the seas, and such as were not of sane mind, having a further space of five years allowed to them and their heirs after the death of their husbands, or their attaining full age, recovering their liberty, returning to England, or being restored to their right mind (*x*) ; and by the 4 Anne, c. 16, the *entry* required to be followed up by action within one year afterwards. It is to be observed, however, that, in order to bar by non-claim persons who were not parties or privies (*i.e.*, *strangers*), it was necessary that the person levying the fine should be seised of the freehold, either by right or by wrong (*y*),—for if he had nothing in the land, or if his possession were merely as tenant for a term of years, the fine might have been avoided by pleading *partes finis nihil habuerunt* (*z*). And it is further to be remarked, that persons having only estates in remainder or reversion, were not bound to make claim within five years after the proclamations made, but within five years after their right of entry accrued (*a*).

3. A fine levied by tenant in tail, with proclamations, barred the issue in tail ; for although it had been expressly provided by the Statute *De Donis*, that a fine should have no such effect (*b*), still by the 32 Hen. VIII. c. 36, it was declared, that a fine, when levied with proclamations according to the 4 Hen. VII. c. 24, by any person of full age,

(*s*) 2 Bl. Com. 354.

(*t*) Co. Litt. by Harg. 121 a, n. (1).

(*u*) 4 Hen. 7, c. 24 ; *Davies* v. *Lowndes*, 5 Bing. N. C. 172.

(*x*) 2 Bl. Com. 356.

(*y*) *Davies* v. *Lowndes*, *ubi supra*.

(*z*) Stat. 4 Hen. 7, c. 24 ; 2 Bl. Com. 356 ; *Doe* d. *Thomas* v. *Jones*, 1 Tyrw. 506.

(*a*) Co. Litt. 372 a.

(*b*) 2 Bl. Com. 355 ; *Doe* v. *Jones*, 1 Tyrw. 517 ; Burton, 239.

should be a sufficient bar and discharge for ever against the tenant *and his heirs*, claiming only by force of the entail (*c*), but not those in remainder or in reversion upon the entail.

4. If tenant in tail of a corporeal hereditament in possession levied a fine "*sur cognizance de droit come ceo, &c.*," with or without proclamations, it was a *discontinuance* of the entail (*d*) ; and thereby the issue in tail, and those in remainder or in reversion, lost their right of entry, and were driven to their writ of *formedon*,—but (if the fine was levied with proclamations) the issue lost also their writ of *formedon*. But a fine levied by tenant in tail of an incorporeal hereditament, or of an hereditament corporeal in remainder upon an estate of freehold,—or in fact of any hereditament which lay in grant at common law,—was no discontinuance (*e*), but only created a base fee (*f*) ; and by the 3 & 4 Will. IV. c. 27, no discontinuance now takes away any right of entry.

5. A fine "*sur cognizance de droit come ceo, &c.*" levied by a tenant for life in possession, worked a forfeiture, if for a greater estate than the law entitled him to make; and consequently destroyed the contingent remainders (if any) expectant on his life interest (*g*) ; and the same result, as regards forfeiture, also followed, where such fine was levied by a tenant for a term of years (*h*).

Secondly, of *Recoveries*.

A recovery—or *common* recovery as it was also called,—differed from a fine, in that it supposed the suit not immediately compromised, but carried on through all its stages (*i*). Its nature and progress were as follows :—

[Let us suppose Daniel Edwards to have been tenant in

(*c*) Co. Litt. by Harg. 121 a, n. (1).

(*d*) Co. Litt. 327 b ; 2 Inst. 335, 336 ; *Odiarne* v. *Whitehead*, Burr. 714 ; *Doe* d. *Thomas* v. *Jones*, 1 Tyrw. 506.

(*e*) Co. Litt. 332 a ; 5 Cruise, Dig. 236.

(*f*) Co. Litt. by Butler, 331, n (1).

(*g*) 2 Bl. Com. 274 ; 2 Cruise, Dig. 361 ; 5 Cruise, Dig. 203, 236.

(*h*) Burt. Compend. 318.

(*i*) 2 Bl. Com. 357.

[tail in possession, and desirous of suffering a common recovery, in order to bar all entails, remainders, and reversions, and to convey the absolute fee simple to Francis Golding. To effect this, Golding as demandant (or plaintiff) sued out against Edwards a writ called a *præcipe quod reddat*,—in which writ he alleged that the defendant Edwards had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned out the demandant; whereupon the tenant appeared, and called upon (or *vouched*) one Jacob Morland, who was supposed to have warranted the title to Edwards; and Edwards prayed that Jacob Morland (*the vouchee*) should defend the title which he had so warranted; and Jacob Morland appeared and defended the title. Whereupon Golding desired leave of the court to *imparl*, or confer with the vouchee in private,—which leave was usually granted as a matter of course; and soon afterwards Golding returning to court, but Morland having disappeared or made default, judgment was given for Golding (thenceforth called the *recoveror*) to recover the land in question against the tenant Edwards (the *recoveree*); and Edwards had judgment to recover of Jacob Morland land of equal value, in recompense for the land so warranted by him, and lost by his default,—which was called the recompense, or *recovery in value*. But Jacob Morland having no land of his own, being usually the crier of the court (who from being thus frequently vouched was called the *common vouchee*), it was plain that Edwards had only a nominal recompense for the land so recovered against him by Golding; which land was then absolutely vested in the recoveror, by judgment of law, and seisin thereof was delivered to him by the sheriff of the county,—so that this collusive recovery operated merely in the nature of a conveyance in fee simple from Edwards the tenant in tail, to Golding, the purchaser.

The recovery above described was with a single voucher only; but in modern times, it was usual to have a recovery

[with *double* voucher at the least, by first conveying (where the person whose estate tail was intended to be barred was *immediate* tenant in tail) an estate of freehold to any indifferent person against whom the *præcipe* was brought (which was called making a tenant to the *præcipe*), and such tenant to the *præcipe* vouched the tenant in tail, who vouched over the common vouchee ; for if the recovery was had immediately against the tenant in tail, it barred only the estate in the premises of which he was then actually seised, whereas, if the recovery were had against another person, and the tenant in tail were vouchee, it barred every latent right and interest which he might have in the land recovered (*k*).

In all recoveries it was necessary that the recoveree should be seised of the freehold in possession (*l*) ; for all actions to *recover the seisin* (as distinguished from the mere possession) of land were required to be brought against the actual tenant of the freehold ; and from this doctrine it resulted, that a tenant in tail *in remainder*, expectant on an estate of freehold, could not resort to a recovery to bar the entail, without the concurrence of the person in whom that precedent estate was vested ; for unless the latter joined in the proceedings, there could be no sufficient tenant to the *præcipe*.

The effects of a recovery suffered in due form were these :—

1. It operated to pass to the recoveror an estate in fee simple absolute,—and thereby to bar not only the estate tail itself, but all remainders and reversions expectant thereon, and all executory limitations and conditions whatever, to which it had been subject (*m*) ; but by the 11 Hen. VII. c. 20, no woman, after her husband's death, unless with the concurrence of those in reversion, could suffer a recovery of lands entailed on her by her husband,

(*k*) Bro. Ab. tit. Taile, 32; Plowd., *Manxel's Case* [8].

(*l*) Pigot, 28.

(*m*) See 2 Bl. Com. 361.

[or on her and her husband by any of his ancestors,—which was called an estate tail *ex provisione viri* (*n*) ; and by the 14 Eliz. c. 8, the like provision applied to the estate of a tenant in tail *after possibility of issue extinct* ; and by the 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion was in the king, could bar such estate tail, or the remainder or reversion of the crown (*o*).

2. A recovery, like a fine, would bind a married woman when she became a party to it with her husband's concurrence ; and, as in the case of a fine, she was privately examined by the court in such cases, to ascertain that she acted without compulsion (*p*).

3. And lastly, a recovery suffered by a tenant for life worked a forfeiture of the particular estate, and by consequence destroyed all contingent remainders expectant thereon (*q*). It was, however, expressly provided by the 14 Eliz. c. 8, that a recovery so suffered, without the consent of the persons in reversion or *vested* remainder, should as against such persons be utterly void.

Having now considered fines and recoveries separately, it will be convenient to consider one incident which was common to both species of assurance, viz., the deed to *lead* or to *declare* their *uses*. For as the fine *sur cognizance de droit come ceo*, &c., conveyed an absolute estate without any limitations to the cognizee, and as common recoveries conveyed the like estate to the recoveror,—these assurances could not, by themselves, be made to answer the purposes of family settlements ; and a deed limiting the uses was therefore necessary ; which deed, if it was made previous to the fine or recovery, was called a deed to *lead* the uses,

(*n*) 5 Cruise, Dig. 399; *Kirkman* v. *Thompson*, Cro. Jac. 474.

(*o*) *Perkins* v. *Sewell*, 1 Bl. Rep. 654 ; *Duke of Grafton* v. *Birmingham Railway Company*, 5 Bing. N. C. 27.

(*p*) 5 Cruise, Dig. 392.

(*q*) *Doe* d. *Davies* v. *Gatacre*, 5 Bing. N. C. 609.

[and if subsequent, a deed to *declare* the *uses*. As if A. (tenant in tail, with reversion to himself in fee) wished to settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee,—he had no power of doing so effectually, while his own estate tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine to (or if there were any intermediate remainders, to suffer a recovery in favour of) E., and directed that the same should enure to the uses in such settlement mentioned ; and the fine when levied, or the recovery when suffered, would enure to the uses so specified, and no other ; and these uses were executed immediately by force of the Statute of Uses (*r*). Or, if a fine or recovery were had without any previous settlement, and a deed were afterwards made between the parties, *declaring* the uses to which the same should be applied ; this would be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses ; for by the statute 4 & 5 Anne, c. 3, indentures to declare the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, were made good and effectual in law ; and the fine or recovery was declared to enure to such uses accordingly.]

We will now proceed to consider the simpler assurances which have, by the 3 & 4 Will. IV. c. 74, been substituted for fines and recoveries :—

And, Firstly, with reference to the Barring of Estates Tail, the statute provides in substance as follows (*s*) :—That every actual tenant in tail (*t*), whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of the lands entailed, for an estate in fee simple absolute, or for any less estate, as against all persons claiming under the estate tail, or in respect of any ulterior estate (including the crown) ; and such disposition may be

(*r*) 2 Bl. Com. 363.

(*s*) 3 & 4 Will. 4, c. 74, s. 15.

(*t*) The "actual tenant in tail" is "the tenant of an estate tail which shall not have been barred."

made by any of the assurances (a will only excepted) which would have sufficed for the purpose, supposing the estate to have been a fee simple absolute,—so that the disposition be an actual conveyance, and not one resting in contract only, and so that it be by deed, and enrolled in Chancery (now the Central Office) within six calendar months after execution (*u*). An estate tail in lands of freehold tenure, may consequently now be barred as against the grantor himself, the issue in tail, and all others in remainder, reversion, or other expectancy by any of the conveyances (whether at common law or under the Statute of Uses) which have been discussed in former chapters,—always supposing such conveyance to be by deed, and that the deed is duly enrolled within the time limited in that behalf. Supposing the enrolment made in due time (*x*), the deed takes effect from the execution (*y*); but a subsequent deed, if first enrolled, will be entitled to priority (*z*); and a bargain and sale, if enrolled under the 3 & 4 Will. IV. c. 74, need not also be enrolled under the Statute of Inrolments (*a*).

It will be recollected, that though, by a fine, the issue might always be barred at pleasure, a common recovery (which alone barred those in remainder or reversion) was ineffectual when suffered by a tenant in tail not having an estate of freehold in possession, unless he obtained the concurrence of the person in whom the freehold in possession was vested: and accordingly, and for the purpose of affording protection to family settlements, in which (we may remember) it is usual to vest in the parent a life estate and to limit estates in remainder to the sons successively in tail, expectant on the determination of such life estate, it was by the Act enacted (*b*), that no disposition, by a person who was tenant in tail under a settlement, should be effectual under the Act to bar any person but

(*u*) 3 & 4 Will. 4, c. 74, s. 40, 73.
(*x*) Sect. 41.
(*y*) Sect. 74.
(*z*) Sect. 74.
(*a*) Sect. 41.
(*b*) Sect. 34.

those claiming by force of the entail (that is to say, the issue only), unless it was made with the consent of the person who (within the meaning of the Act) was "owner" of the first estate of freehold, (or for years determinable on a life or lives,) prior to the estate tail (*c*) ; and the person whose consent was thus required, received the appellation of *protector of the settlement*. This provision, however, it is material to remark, is expressly confined to the case where the prior estate is created *by the same settlement* as the entail ; for where it is constituted by a different assurance, the Act leaves the tenant in tail to the free exercise of his power of disposition ; but the following estates, namely,—an estate created by appointment, under a power in the settlement (sect. 1) ; an estate confirmed or restored by the settlement (sect. 25) ; an estate resulting to the settlor (sect. 22) ; and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement (sect. 22),—are, respectively, to be considered as "*created* by the settlement."

Where an assurance is executed by a tenant in tail, in such form and with such attendant ceremonies as the statute requires, it passes an indefeasible estate in fee simple absolute, or for life, or years, or otherwise, according to the nature of the limitation ; but if it be executed without the consent of the protector, in a case where a protector exists (*d*), its effect is only to bar the tenant and his issue in tail ; and the rights of other persons claiming in expectancy on the estate tail are in that case not affected (*e*), —so that an assurance purporting to be in fee simple absolute, will in such latter case convey no more than a base fee determinable on the failure of issue (*f*) ; but it is in the power of the tenant, by afterwards obtaining the consent of the protector, and making a new disposition thereon, —

(*c*) 3 & 4 Will. 4, c. 74, s. 22.
(*d*) *Bell* v. *Holtby*, Law Rep. 15 Eq. Ca. 178.
(*e*) Sects. 15, 34.
(*f*) Sect. 1.

or by confirming his former disposition when the protectorship has ceased,—to enlarge such base fee into a fee simple absolute (*g*). And in the particular case, when, for want of the protector's consent, such base fee is created, and the immediate remainder or reversion in fee happens also to become united in the same person with the base fee,—the latter will, without any such consent or new disposition, enlarge *of itself* into a fee simple absolute (*h*). But whether the bar effected be general or partial only in its nature, it is to be understood that in all cases it operates without prejudice to the interests of other parties not claiming by force of, or in expectancy upon, the entail,—consequently it leaves all estates *prior* to the estate tail undisturbed (*i*).

And as regards the protector of the settlement (being, in general, the prior freeholder) (*k*), the Act provides specifically, that a lessee for life at a rent, or anyone entitled as dowress, bare trustee, heir, executor, administrator, or assign (*l*), shall not be deemed the protector; also, that the settlor himself may, in and by the settlement creating the entail, appoint any person or persons *in esse* (not exceeding three in number) to act in the capacity of protector (the tenant of the prior estate being included in the number or not, at the pleasure of the settlor), and may also insert in the settlement a power for the substitution of others, in the event of the death or retirement of those originally nominated (*m*).

The office of protector is intended to be in every case a *personal* one; and therefore a protector does not lose his right to act in that capacity by a transfer of the estate in virtue of which it was acquired,—whether that transfer takes place by his own alienation, or by his other act or default (*n*); but when the person who would otherwise be

(*g*) 3 & 4 Will. 4, c. 74, ss. 19, 35.
(*h*) Sect. 39.
(*i*) Sects. 15, 19.
(*k*) Sects. 29, 30, 31.
(*l*) Sects. 26, 27, 28, 31.
(*m*) Sect. 32.
(*n*) Sect. 22.

protector is incompetent by reason of insanity, the Lord Chancellor (or other person deputed to exercise the royal functions with respect to idiots and lunatics) is to become protector in his stead ; and where he who would otherwise be protector is disabled by treason or felony, the office is vested in Chancery,—to which latter jurisdiction it is also confided in some other particular cases (*o*). A married woman is competent to be protector ; and if the prior estate, in respect of which she becomes so, is settled to her separate use, she is to hold the office independently of her husband,—but where not so settled, in conjunction with him only (*p*). We may remark, too, that the office of protector is in every case of a purely discretionary character ; so that the protector is absolutely free from all control in its exercise, and cannot, even by his own previous agreement, fetter his free agency in this respect (*q*). And lastly, with regard to the consent which it is thus absolutely in his power to grant or to withhold, —that consent may either be given by the same instrument which makes the disposition, or by a separate one to be executed on or before the same day with the other, and to be duly enrolled : and when once given, the consent is incapable of being revoked (*r*).

It is not only on *legal* estates that an assurance under the statute in question will operate, nor in respect of these only that its operation was required. It is indeed generally true, that an *equitable* estate will pass by any instrument sufficient to indicate the intention of the grantor; but such estates when entailed are exceptions to this rule, and cannot be transferred except by the appropriate methods ; and it was in fact the practice, before the statute passed, to convey entailed equitable interests through the medium of fines and recoveries (*s*) ; which, though always transacted in a common law court, were considered in equity as

(*o*) 3 & 4 Will. 4, c. 74, ss. 33, 48.
(*p*) Sects. 24, 45, 79.
(*q*) Sects. 36, 37.
(*r*) Sects. 42, 44, 46.
(*s*) 5 Cruise, Dig. 301, 461.

legitimate assurances for the purpose. Thus, if lands were given to the use of A. in fee, in trust for B. in tail, with remainder over,—a fine levied or recovery suffered by B. was recognized in the courts of equity as a bar to his equitable estate,—that is, a bar to the extent to which the same assurance would have operated on a legal estate of the same description (*t*); and by the 3 & 4 Will. IV. c. 74, a similar effect now belongs to the substituted assurance, the word "estate" being used throughout the Act "to express an estate in equity, as well as at law" (*u*).

The statute is also framed to take effect not only on actual entails, but upon money liable to be converted into land; as where trustees are directed to invest money in land, which, when purchased, is to be settled in tail; or to sell entailed land and to invest the produce in like manner,—for with respect to trusts of this description, the statute provides, that its provisions shall be applicable (so far as circumstances will permit) to the monies so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust; but any disposition of such monies by the tenant in tail must be made, not by a conveyance appropriate to the passing of the realty, but by a deed of assignment inrolled in Chancery (Central Office) within six calendar months after the execution (*v*).

Where an infant is tenant in tail, and is in possession, and there is no protector of the settlement,—and the court makes a vesting order under the Trustee Act, 1893 (*w*), or appoints some person to convey the estate of the infant, the effect is to bar the estate tail and remainders over,—for the order vests the land for such estate as the infant, if of full age, could convey (*x*).

(*t*) *Doe* d. *Cadogan* v. *Ewart*, 7 Ad. & El. 636.

(*u*) 3 & 4 Will. 4, c. 74, s. 1.

(*v*) Sect. 71.

(*w*) 56 & 57 Vict. c. 53, ss. 31, 32, 50.

(*x*) *Faber* v. *Montagu*, [1896] 1 Ch. 549; and see *Powell* v. *Matthews*, 1 Jur. (N.S.) 973.

Secondly, with reference to the Binding and Assurance of the Estates of Married Women,—the statute provides, generally, that a married woman shall be as competent as if she were a feme sole, to dispose by deed of lands of any tenure, or of money subject to be invested in the purchase of lands—and also to extinguish any estate which she, (or she and her husband in her right,) may have, or any power which may be vested in her, in regard to lands or to money of that description,—provided always that her husband shall concur in the deed (*y*); and provided also that upon the execution thereof, or at some time afterwards, she shall produce the deed and acknowledge it before the proper authorities (*z*). The acknowledgment may be taken either before one of the judges (*a*), or before two (now one) of the commissioners from time to time appointed for that purpose (*b*), or before a judge of a county court (*c*); and it is the duty of such authorities, before they receive her acknowledgment, to examine the woman apart from her husband, in order to ascertain her free and voluntary consent; and in the absence of such consent, the acknowledgment is to be rejected, and the deed becomes void, as far as relates to her execution (*d*). Supposing the acknowledgment on the other hand to be received, a memorandum of the fact used to be written on the foot or margin of the deed; and a certificate thereof used to be also drawn up and signed on a separate piece of parchment, and verified by affidavit; and the certificate and affidavit were then to be filed of record in court; and until so recorded, the deed had no effect as regards the party under coverture (*e*); but, when the record was complete, it operated to affect her interest, (by relation,) as from the time when it was acknowledged. But now, as regards the deeds of married women executed after the

(*y*) 3 & 4 Will. 4, c. 74, s. 77.
(*z*) Sect. 79.
(*a*) Sect. 80.
(*b*) 45 & 46 Vict. c. 39, s. 7.
(*c*) 19 & 20 Vict. c. 108, s. 73.
(*d*) 3 & 4 Will. 4, c. 74, s. 80.
(*e*) *Jolly* v. *Handcock*, 7 Exch. 820.

31st December, 1882, and requiring to be acknowledged by them, it appears that the memorandum of acknowledgment simply is written at the foot or in the margin of the deed; and the matter is therewith complete, no certificate or affidavit, or any recording of either, being required (*f*). When the object of the disposition is to bar the estate *tail* of a married woman, the same course of proceeding is to be observed as in the case of other tenants in tail; and the ceremony of acknowledgment is to be superadded (*g*).

The court is also empowered by order, in a summary way upon the application of the wife, and upon such evidence as to the court shall seem meet, to dispense (in every case where it shall appear reasonable to do so) with the concurrence of the husband in her acts, whether in barring an estate tail, or in executing a deed for any other purpose (*h*), saving nevertheless such rights as the husband may possess independently of the Act (*i*).

(*f*) 45 & 46 Vict. c. 39, s. 7.
(*g*) 3 & 4 Will. 4, c. 74, ss. 40, 79.
(*h*) Sect. 91; *Goodchild* v. *Dougal*, 3 Ch. D. 650.
(*i*) 3 & 4 Will. 4, c. 74, s. 91; *Fowke* v. *Draycott*, 29 Ch. Div. 996.

CHAPTER XX.

OF THE CONVEYANCE BY DEVISE.

THE next conveyance (or assurance) to be considered is that by *devise* or will ; and this operates from the death of the testator, his will being merely *ambulatory* during his life,—" *Omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem* " (*a*).

[According to the old Roman law, a will or testament was " *voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit* " (*b*),—*sententia* denoting the circumspection and prudence with which it was supposed to be made ; *voluntatis nostræ sententia* denoting that it declared the testator's intention, or emphatically his *will* ; *justa sententia* denoting that it was drawn, attested, and published, with all due solemnities and forms of law ; and *de eo quod quis post mortem suam fieri velit*, denoting that it was of no force until after the death of the testator.] The term *codicil* signifies an instrument made subsequently to the will, and by which the dispositions of the will are added to, taken from, or otherwise altered ; and it is like the will in most respects, of which indeed it is considered as forming a part,—so that what may be laid down as law regarding a will, may be taken generally as applicable also to every codicil thereto (*c*).

[The right to make a will is merely a creature of the civil state, which has permitted it or not according as political circumstances have appeared to dictate ; and even

(*a*) Co. Litt. 112.
(*b*) Ff. 28, 1, 1.
(*c*) 2 Bl. Com. 500 ; *Anderson* v. *Anderson*, Law Rep., 13 Eq. Ca. 381 ; *Green* v. *Tribe*, 9 Ch. D. 231.

[where it is permitted by law, it is subjected to different formalities and restrictions in almost every state. In our own country, both real and personal estate have long been capable of transmission by will; but for the present we shall confine ourselves to real estate and to lands of freehold tenure; and we shall consider, I. The power of devise itself; II. The solemnities which attend the execution, revocation, and revival of wills; III. The rules of construction to which devises are subject; and IV. The operation of devises in conveying or limiting real estate.

I. As to the power of devising,—it seems that, at a period antecedent to the Conquest, lands were devisable in this country (*d*); but that upon the introduction of the military tenures, a restraint on devising lands naturally followed as a branch of the feudal doctrine of non-alienability without the consent of the lord,—so that *after* the Conquest, no estate greater than for term of years could be disposed of by testament (*e*),—except only in Kent and in some antient boroughs, and in a few particular manors, where the old Saxon immunities continued, by special indulgence, to subsist (*f*). And though the feudal restraint on alienation by deed vanished very early, yet the restraint on alienation by will continued for some centuries after (*g*); but when, in due course, uses were invented, they began to be devised (*h*); and then came the Statute of Uses (27 Hen. VIII. c. 10), by the effect of which these uses, becoming legal estates, ceased to be devisable; whereupon, by the old *Statute of Wills*, 32 Hen. VIII. c. 1 (explained by 34 & 35 Hen. VIII. c. 5),—all persons being seised in fee simple (except femes covert, infants, idiots, and persons of non-sane memory,) were enabled by will in writing to devise to any other person, (except to bodies corporate,)

(*d*) Wright's Ten. 172.
(*e*) 2 Inst. 7.
(*f*) Litt. s. 167; Co. Litt. 111. *Vide* Rob. Gavel. 235.
(*g*) Glan. lib. 7, ch. 1.
(*h*) Plowd. 414; Gilb. on Devises, 7.

[*two-thirds* of their lands, tenements, and hereditaments held in chivalry, and the *whole* of their lands held in socage; and this partial power of devising lands became, of course, complete upon the alteration of tenures effected by the statute of Charles the Second, whereby *chivalry* was converted into *socage* (*i*). And a devise under these statutes took effect, not only upon legal, but also upon equitable estates. But the devise was inoperative, unless the land belonged to the testator at the time of making his will; in other words, lands acquired after the making (*i.e.*, the execution) of the will were incapable of passing under the devise; and if the testator was desirous of including such lands in his testamentary dispositions, a new will or codicil, or a re-execution of the existing will, was required for the purpose (*k*).]

Such was the power of devising as it existed at the date of the 7 Will. IV. & 1 Vict. c. 26; and now, under that Act (commonly called "The New Wills Act") any person (being of full age, and if a female being unmarried) is able to dispose by will of all real and personal estate, legal or equitable, to which he or she shall be entitled at the time of his or her death, and which, but for such disposition, would pass to his or her heir at law; and the Act expressly extends this power of disposition to an estate held *pur autre vie*, and to any contingent, executory, or other future interest, and even to a right of entry upon land, a class of interest previously regarded as incapable of being devised (*l*). The power is also expressly extended to after acquired property, by a provision that all real estate, to which the testator is entitled at the time of his death, shall pass by his will, notwithstanding that he may become entitled to the same subsequently to the execution

(*i*) *Butler and Baker's Case*, 3 Rep. 25; *Arthur* v. *Bokenham*, 11 Mod. 148; *Wyndham* v. *Chetwynd*, Burr. 420.

(*k*) 2 Bl. Com. 378; *Langford* v. *Pitt*, 2 P. Wms. 629; *Marston* v. *Roe*, 8 Ad. & El. 14.

(*l*) *Doe* v. *Tomkinson*, 2 Mau. & Sel. 165; *Goodright* v. *Forrester*, 8 East, 552.

of the will (*m*). And there being no exception in the Act with regard to corporations, a devise even to a body corporate is now valid, subject to the Statutes of Mortmain, by which corporations are required to obtain the crown's licence, to enable them to become the *holders* of land; but of course, the prohibitions contained in the Mortmain Acts, as to a devise to *charitable* uses remain in force (subject only to the relaxations which have been successively made by these Acts). On the other hand, the Act contains an express exception to the power of devising, in reference to married women and infants—the first being only allowed to make a valid disposition in cases in which they might have done so before the Act (*n*), and minors being made wholly incompetent—and to these we must of course understand the exception to be tacitly added which would be introduced by the general rules of law, in respect of idiots, insane persons, and others labouring under personal incapacity to convey in any manner whatever (*o*). But as regards married women, it must be known, that they might always dispose of their separate real estates by will; and also that they might always, in the execution of a power of appointment, dispose of real estates by will; and we shall hereafter see, that under the various Acts relating particularly to the separate estates of married women (*p*) they now have, as regards their separate estates, the fullest powers of devise as indeed of alienation generally.

II. The solemnities which attend the execution, revocation, and revival of a will.—When the old Statute of Wills

(*m*) 7 Will. 4 & 1 Vict. c. 26, s. 3; *Marston* v. *Roe*, 8 Ad. & El. 14.

(*n*) 7 Will. 4 & 1 Vict. c. 26, ss. 7, 8; *Forse and Hembling's Case*, 4 Rep. 60 b; *Johns* v. *Dickinson*, 8 C. B. 934: *Taylor* v. *Meads*, 34 Law Journ. (N.S.) (Ch.) 203; *Pride* v. *Bubb*, Law Rep., 7 Ch. App. 64.

(*o*) *Smith* v. *Tebbitt*, Law Rep., 1 P. & D. 398; *Banks* v. *Goodfellow*, *ib.*, 5 Q. B. 549.

(*p*) 56 & 57 Vict. c. 63, amending 45 & 46 Vict. c. 75, and extending s. 24 of the New Wills Act to the will of a married woman.

(32 Hen. VIII. c. 1) for the first time gave efficacy to devises of the realty, innumerable frauds and perjuries were introduced ; and this need occasion no surprise, for at that time bare notes, in the handwriting of the party, became good wills within the statute,—if only *published* by him as such ; that is, if only declared by the testator to be intended to operate as his last will and testament (*q*) ; and except *publication*, no other ceremony was then essential to a written will of personalty (*r*) ; and the old Statute of Wills prescribed no particular solemnity in reference to devises of real estate, except that it required the will to be *in writing*. [To remove all which opportunities for fraud, the *Statute of Frauds and Perjuries* (29 Car. II. c. 3) directed, amongst other things, that devises of lands and tenements should not only be in writing, but should be signed by the testator, or by some other person for him in his presence and by his express direction (*s*) ; and should also be subscribed, in his presence, by three credible witnesses (*t*). And a solemnity nearly similar was, by the same Act (sect. 6), made requisite for *revoking* devises (*u*) ; though devises might also be revoked by the burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence, and with his consent, by any other person, if done *animo revocandi* (*z*) : as it might also be, impliedly, by any new modification of the interest of the devisor in the estate devised (*a*) ; or by such a great and entire alteration in circumstances as arose from his marriage and the birth of a child (*b*), or, in the case of a woman, by her marriage simply (*c*). But in the construction of the Statute of

(*q*) 2 Bl. Com. 376.

(*r*) *Doe* v. *Sir F. Burdett*, 4 Ad. & El. 14.

(*s*) *Baker* v. *Denning*, 8 Ad. & El. 94.

(*t*) *Roberts* v. *Phillips*, 4 Ell. & Bl. 450.

(*u*) *Swinton* v. *Bailey*, 1 Ex. D. 110.

(*z*) *Andrew* v. *Motley*, 12 C. B. (N.S.) 514.

(*a*) *Sparrow* v. *Hardcastle*, 3 Atk. 802.

(*b*) *Re Cadywold*, 1 Swab. & Trist. 34 ; Blackstone, vol. ii. p. 502.

(*b*) *Forse & Hembling's Case*, 4 Rep. 60 b.

[Frauds, it was settled, that the testator's name, written with his own hand at the beginning of the will, as, "I, John Mills, do make this my last will and testament," was a sufficient signing, if intended as such by the testator (*d*); and it was also adjudged, that though the witnesses must all see the testator sign, or at least see him acknowledge his signature, yet they need not all be present at the same time (*e*),—though they must all subscribe their names *in his presence*, lest by any possibility they should mistake the instrument (*f*). And the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor a creditor by simple contract, where the legacies and debts were charged on the real estate, to be a competent witness to the devise (*g*). This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will,—for if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present at the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts,—every disposition in the will, so far as it related to real property, would have been utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credibility of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony,—the same statute likewise establishing the competency of creditors, by directing the testimony of all such creditors to be admitted,—leaving their credit, (like

(*d*) 2 Bl. Com. by Chitty, 376, n. (6).

(*e*) Freem. 486; 2 Ch. Ca. 109; Prec. in Ch. 185.

(*f*) *Longford* v. *Eyre*, 1 P. Wms. 740.

(*g*) *Holdfast* v. *Dowsing*, Stra. 1253.

[that of all other witnesses,) to be considered on a view of all the circumstances, by the court and jury before whom such will should be contested (*h*).]

Such is still the law as to the execution and attestation required for wills made before 1st January, 1838 (*i*) ; but the provisions previously in force are, by 7 Will. IV. & 1 Vict. c. 26, repealed as to all wills made *on or after* that date (*k*), or re-executed or by codicil revived after that date (*l*) ; and it is now enacted (*m*), that no will (whether operating on real or on personal estate, or on both) shall be valid (*n*), unless it be in writing, and signed at the foot or end thereof (*o*) by the testator or some other person, in his presence, and by his direction, such signature being also made or acknowledged by him, in the presence of *two* or more witnesses present at the same time, and such witnesses attesting and subscribing the will in his presence (*p*). Where these requisites, however, are complied with, no other is now imposed by law ; and the statute expressly enacts that no *publication*, other than that which is implied in the execution so attested, shall in future be necessary ; and the statute has also expressly enacted, that wills executing powers of appointment shall be attested in the same manner, and (being so attested) shall be sufficiently attested (*q*). The former provisions, also, with respect to

(*h*) *Cresswell* v. *Cresswell*, Law Rep., 6 Eq. Ca. 69.

(*i*) 7 Will. 4 & 1 Vict. c. 26, s. 34.

(*k*) Sect. 2.

(*l*) *Doe* v. *Walker*, 12 Mee. & W. 591 ; *Winter* v. *Winter*, 5 Hare, 306 ; *Croker* v. *Hertford*, 4 Moore's P. C. Cases, 339.

(*m*) Sects. 9, 11.

(*n*) With regard, however, to wills of *personalty* made by *soldiers* or *seamen* on actual service, and the distribution of their effects when intestate, see 29 Car. 2, c. 3, s. 22; 17 & 18 Vict. c. 104. ss. 194—204 ; 28 & 29 Vict. cc. 72, 111 ; 60 & 61 Vict. c. 15 ; *In the Goods of Spratt*, [1897] P. 28 ; and (as regards the preferential payment of regimental debts) 56 & 57 Vict. c. 5.

(*o*) 15 & 16 Vict. c. 24 ; *Re Peach*, 1 Swab. & Trist. 138 ; *Trott* v. *Skidmore*, 2 Swab. & Trist. 12 ; *Re Williams*, Law Rep., 1 P. & D. 4.

(*p*) *In re William Frith*, 1 Swab. & Trist. 8 ; *Charlton* v. *Hindmarsh*, 8 H. of L. Ca. 160.

(*q*) 7 Will. 4 & 1 Vict. c. 26, s. 10.

the competency of witnesses having an interest, are repealed as to wills taking effect under the new law (*r*) ; and the new enactments on this subject are, first, that the incompetency of any attesting witness shall not invalidate the will ; secondly, that any beneficial gift or appointment by the will to an attesting witness, or to the husband or wife of an attesting witness, (except a charge for payment of debts,) shall be void, and the evidence of the witness admissible ; thirdly, that where land is charged by the will with payment of debts, and the creditor (or husband or wife of the creditor) is an attesting witness, such witness shall nevertheless be competent ; fourthly, that no person shall be incompetent as a witness, on account of his being an executor of the will.

As to revocation, also, the former law was altered by the New Wills Act, it being provided (by sect. 18), that every will shall be revoked by *the marriage* alone either of a testator or of a testatrix—unless, indeed, such will was made in exercise of a power of appointment vested in him or her, and the estate would not have passed, in default of appointment, to his or her representatives ; but that, on the other hand, no will shall be revoked by any presumption of an intention to revoke, raised by any alteration in circumstances or otherwise, except only by the circumstance of marriage (*s*) ; and no alienation of the property devised will prevent the devise taking effect on any estate disposable by the testator at his death (*t*). A revocation may, however, take place by the execution of another will or of a codicil, or of some writing of revocation executed like a will, or by the burning, tearing, or other destruction of the original will (*animo revocandi*), by the testator or by some person in his presence and by his direction (*u*) ; and with

(*r*) 7 Will. 4 & 1 Vict. c. 26, ss. 14, 15, 16, 17.

(*s*) Sect. 19 ; *De Pontes* v. *Kendall*, 10 W. R. 69.

(*t*) Sect. 23.

(*u*) Sect. 20 ; *Francis* v. *Grover*, 3 Hare, 39 ; *Price* v. *Powell*, 3 H. & N. 341.

respect to obliterations or other alterations made after execution, it is provided, that they are to have no effect (where the original meaning can still be deciphered) unless executed with the same ceremonies as the will itself (*x*); though it will be sufficient if the signature of the testator, and the subscription of the witnesses, be made opposite or near the part altered, or at the foot or end of some memorandum written on the will, and referring to the alterations (*y*); but no letter or memorandum not so signed and witnessed can be regarded (*z*). And so when a will is once revoked, it is not to be *revived* otherwise than by re-execution of the original, or by a codicil duly executed and showing an intention of revival (*a*).

III. The rules of construction, to which devises are subject.—These rules are, in great measure, the same rules as apply to conveyances by deed (*b*); but as in making a will, a party is supposed to be *inops consilii* (*c*), there are instances in which the law will carry his intended limitations into effect, though the words used would in a deed be insufficient or improper for the purpose (*d*). Thus, it has always been held, that a fee might be conveyed by devise without legal words of inheritance, and an estate tail without words of procreation (*e*),—provided that other words are used sufficient to indicate the intention (*f*); though in a conveyance by deed, the case used to be otherwise. [So an estate may pass under a will by mere

(*x*) *Gann* v. *Gregory*, 22 L. J. (Ch.) 1059; *Re James*, 1 Swab. & Trist. 238.

(*y*) 7 Will. 4 & 1 Vict. c. 26, s. 21.

(*z*) *McCormick* v. *Grogan*, 4 App. Ca. 82; *Singleton* v. *Tomlinson*, 3 App. Ca. 404.

(*a*) 7 Will. 4 & 1 Vict. c. 26, s. 22; *Andrews* v. *Turner*, 3 Q. B. 177; *Dunn* v. *Dunn*, Law Rep., 1 P. & D. 277; *In the Goods of Chilcott*, [1897] P. 223.

(*b*) *Clayton* v. *Lord Nugent*, 13 Mee. & W. 200; and *vide sup.* p. 351.

(*c*) 2 Bl. Com. 172.

(*d*) Co. Litt. by Butler, 272 a, n. (1); *Slater* v. *Dangerfield*, 15 Mee. & W. 263.

(*e*) *Doe* v. *Bannister*, 7 Mee & W. 298; *Lewis* v. *Puxley*, 16 Mee. & W. 733.

(*f*) *Lloyd* v. *Jackson*, Law Rep., 2 Q. B. 269.

[implication, without any express words to direct its course; *e.g.*, where a man devised lands to his heir-at-law, after the death of his wife,—here though no estate was given to the wife in express terms, yet she was held to have an estate for life by implication (*g*),—for the intent of the testator was clear to postpone the heir until after her death; and if she did not take it, nobody else could. So also, where the devise was of Blackacre to A. in tail, and of Whiteacre to B. in tail, and if they both died without issue, then to C. in fee,—here it was held that A. and B. had *cross-remainders* by implication,—so that, on the failure of the issue of either, the other or his issue would take the whole, and C.'s remainder over would be postponed till the issue of both had failed (*h*); but where such implications are allowed, they must be such as are necessary, or at least highly probable, and not merely possible implications (*i*).] There is also this difference between deeds and wills in point of construction, that supposing a will to contain two inconsistent clauses, that which comes last in order shall prevail (*k*); though in a deed the preference is, as we have seen, due to that which comes first.

A devise also is subject to a less strict rule than a conveyance by deed, in respect of the description of the thing granted. Thus, if I convey my house by deed, describing it as a house and not as land, we have seen that no land can pass, except the orchard, garden, and curtilage; but the question what shall pass by the *devise* of a house (or of a house "with the appurtenances") is purely a question of intention, to be determined, like other points of construction, by the tenor of the whole will; and a devise in either form may, under special circumstances, have the effect of passing even adjacent land or buildings (*l*).

There are also some particular points of construction with

(*g*) 1 Vent. 376.
(*h*) Freem. 484.
(*i*) Vaugh. 262.
(*k*) Co. Litt. 112 b.; Plowd. 541; *Doe* d. *Spencer* v. *Pedley*, 1 Mee. & W. 677.
(*l*) *Webber* v. *Stanley*, 16 C. B. (N.S.) 698.

regard to devises, which have been established by parliamentary enactment. For the former state of the law upon these points, as settled by judicial decisions, having been deemed unsatisfactory, it was though fit, in the New Wills Act, to regulate them for the future upon different principles, that is to say, in the respects following :—

1. As the dispositions made by a testator cannot take effect, and are not intended to take effect, till after his death, it has often become a question whether in his description of the property devised, or of the persons in whose favour he devises, he shall be considered as referring to the state of things which exists when he executes his will, or to that which may exist at the time of his death. As to bequests of personal estate, the rule has always been, that the will speaks as at the time of death : but in devises of the realty, the opposite construction formerly obtained,—the will being held to speak, in general, as at the time of its execution (*m*). But the new statute has now assimilated the construction of *devises* upon this point to that of *personal bequests* ; for it provides, that "every will shall be "construed, with reference to the real estate and personal "estate comprised in it, to speak and take effect as if it "had been executed immediately before the death of the "testator, unless a contrary intention shall appear by the "will" (*n*).

2. Though an estate in fee was always allowed to pass by devise, without apt words of inheritance, provided there were other expressions to show the testator's intention to confer a fee, yet, prior to the New Wills Act, a long train of judicial decisions had established that a mere devise of a house or land would not suffice to indicate that intention, but would confer only an estate for life (*o*).

(*m*) *Lomax* v. *Holinden*, 1 Ves. sen. 295 ; *King* v. *Bennett*, 4 Mee. & W. 36.

(*n*) 7 Will. 4 & 1 Vict. c. 26, s. 24 ; *Castle* v. *Fox*, Law Rep., 11 Eq. Ca. 542 ; *Everett* v. *Everett*, 6 Ch. D. 122.

(*o*) *Pickwell* v. *Spencer*, Law Rep., 6 Exch. 190.

Thus, if I were seised *in fee* of a house at A., and devised the same to B., adding either the words *and his heirs*, or equivalent words, expressive of an intention that he should take my whole estate therein, the house would pass to him, in either case, in fee ; but if I devised to him such house, without adding *and his heirs*, or using such other equivalent words as above mentioned, he would take an estate in it for his life only (*p*). This rule had always given much dissatisfaction, as establishing a construction contrary to that which common sense presumes to be the real intention of the party (*q*) ; and by 7 Will. IV. & 1 Vict. c. 26, s. 28, it has accordingly been provided, that "where any real "estate shall be devised to any person without any words "of limitation, such devise shall be construed to pass the "fee simple, or other the whole estate or interest which the "testator had power to dispose of by will, in such real "estate, *unless* a contrary intention shall appear by the "will."

3. In devises to *trustees*, it had been a general rule prior to the New Wills Act, that though no words of inheritance were used in the limitation to them, yet they should take such an estate (even to the extent of the whole fee) as might be necessary to enable them to perform the trusts ; but the question often arose, whether in particular instances they would take the fee, or a less estate,—and if the fee, whether it would be determinable or not when the trusts were satisfied (*r*). But by 7 Will. IV. & 1 Vict. c. 26, s. 30, it is now provided, that "where any real estate (other "than or not being a presentation to a church) shall be "devised to any trustee or executor, such devise shall be "construed to pass the fee simple, or other the whole "estate or interest which the testator had power to dispose "of by will, in such real estate,—unless a definite term of

(*p*) *Silvey* v. *Howard*, 6 Ad. & El. 253 ; *Bolton* v. *Bolton*, Law Rep., 5 Exch. 152.

(*q*) *Denne* v. *Page*, 11 East, 605, n.

(*r*) *Doe* v. *Ewart*, 7 Ad. & El. 666 ; *Adams* v. *Adams*, 6 Q. B. 860.

"years, absolute or determinable, or an estate of freehold, "shall thereby be given to him expressly, or by impli- "cation." And further (by sect. 31), that "where any "real estate shall be devised to a trustee, without any "express limitation of the estate to be taken by such "trustee, and the beneficial interest in such real estate, or "in the surplus rents and profits thereof, shall not be given "to any person for life—or such beneficial interest shall "be given to any person for life, but the purposes of the "trust are to continue beyond the life of such person— "such devise shall be construed to vest in such trustee the "fee simple, or other the whole legal estate which the "testator had power to dispose of by will, in such real "estate, and not an estate determinable when the purposes "of the trust shall be satisfied."

4. If, in the interval between the execution of a will and the death of the testator, one of the objects of his bounty should die, the devise will, by the general rule of law, *lapse*, that is, fail, and take no effect,—and this, though the devise should be to the devisee and *his heirs*, or to him and *the heirs of his body* ; and the subject-matter of it will be considered as not disposed of by the will. This rule, where an estate in *tail* had been given to one who died and left children, was attended with peculiar hardship; for if there were a devise to A. and the heirs of his body, and he died before the testator, the gift was void, even though he left issue. So if a testator gave his property among his own children, and one of them died before him, leaving issue, such issue would take nothing under the will, though the probability was, that this consequence could not have been intended. It is true, that a testator had it always in his power to make a new disposition in favour of the children of a deceased devisee ; but either from negligence or ignorance of the law, or from other accidental causes, this was often omitted; and an alteration of the law itself, as applicable to cases of this description, being therefore desirable, the 7 Will. IV. & 1 Vict. c. 26, s. 32,

has provided, that "where any person to whom any real "estate shall be devised for an estate tail, or an estate in "*quasi* entail, shall die in the lifetime of the testator, "leaving issue who would be inheritable under such entail, "and any such issue shall be living at the time of the death "of the testator—such devise shall not lapse, but shall take "effect" (in the pre-deceasing devisee and so descend from him to his issue) "as if the death of such person had "happened immediately after the death of the testator, "unless a contrary intention shall appear by the will." And further (by sect. 33), that "where any person, being "a child or other issue of the testator, to whom any real or "personal estate shall be devised or bequeathed for any "estate or interest not determinable at or before the death "of such person, shall die in the lifetime of the testator, "leaving issue, and any such issue of such person shall be "living at the time of the death of the testator,—such "devise or bequest shall not lapse, but shall take effect" (in the pre-deceasing devisee or legatee) "as if the death of "such person had happened immediately after the death "of the testator, unless a contrary intention shall appear "by the will" (*s*). In addition to which enactments, and in connection with the subject of lapse, we may notice this further provision (sect. 25), introductory of a new rule, in cases where a lapse occurs, namely,—that "unless a con- "trary intention shall appear by the will, such real estate or "interest therein as shall be comprised, or intended to be "comprised, in any devise in such will contained, which "shall fail or be void by reason of the death of the devisee "in the lifetime of the testator, or by reason of such devise "being contrary to law, or otherwise incapable of taking "effect, shall be included in the *residuary devise* (if any) "contained in such will" (*t*).

5. Under a devise by a testator, having leasehold estate

(*s*) *Johnson* v. *Johnson*, 3 Ha. 157; *Winter* v. *Winter*, 5 Ha. 306; *Eager* v. *Furnivall*, 17 Ch. D. 115; *Stansfeld* v. *Stansfeld*, 15 Ch. D. 84.

(*t*) *Doe* v. *Underdown*, Willes, 293; *Crawshaw* v. *Crawshaw*, 14 Ch. D. 817; *Hetherington* v. *Longrigg*, 15 Ch. D. 635.

only,—of "all my lands and tenements,"—a lease for years has always been allowed to pass, for there would otherwise be nothing for the will to operate upon; but if a testator, using such words, had lands in fee, as well as leaseholds, at the time, the lands in fee only would pass (*u*). It is now, however, provided by 7 Will. IV. & 1 Vict. c. 26, s. 26, that "a devise of the land of the "testator, or of the land of the testator in any place, or in "the occupation of any person mentioned in his will, or "otherwise described in a general manner, and any other "general devise which would describe a [customary copy-"hold or] leasehold estate, if the testator had no freehold "estate which could be described by it—shall be construed "to include the [customary copyhold and] leasehold "estates of the testator or his [customary copyhold and] "leasehold estates, or any of them, to which such descrip-"tion shall extend, as the case may be, (as well as freehold "estates,) unless a contrary intention shall appear by the "will" (*x*).

6. In like manner, where a party, having an *estate* in lands (being lands which he is competent to devise), is also entitled, by virtue of a *power* conferred on him for the purpose, to appoint other lands by his last will and testament, it was the rule, prior to the New Wills Act, that a general devise of his lands would operate only on those in which he had the estate, and would not affect those subject to the power,—though it was otherwise if he expressly referred to the power, or if it appeared by other circumstances (as by his having no estate for the will to work upon), that he intended the subject of the power to pass (*y*); and such is still the general rule where the power is special, and to be exercised only in favour of particular individuals or classes of person (*z*). But where the power is general,

(*u*) *Rose* v. *Bartlett*, Cro. Car. 293.

(*x*) *Prescott* v. *Barker*, Law Rep., 9 Ch. App. 174.

(*y*) *Denn* v. *Roake*, 5 Barn. & Cress. 731.

(*z*) *Mills* v. *Mills*, 34 Ch. Div. 186; *Wood* v. *Cotton*, 40 Ch. Div. 41; *Cadell* v. *Willcocks*, [1898] P. 21.

and enables the testator to appoint to any person that he pleases (which amounts in substance to an ownership), the law is now altered by the New Wills Act, which provides (by sect. 27), that "a general devise of the real "estate of the testator, or of the real estate of the testator "in any place, or in the occupation of any person men- "tioned in his will, or otherwise described in a general "manner,—shall be construed to include any real estate "or any real estate to which such description shall extend "(as the case may be), which he may have power to "appoint in any manner he may think proper,—and shall "operate as an execution of such power, unless a contrary "intention shall appear by the will,"—a principle of construction which is expressly made applicable also to personal estate (*a*).

7. By a rule of legal interpretation, at variance with the common apprehension of mankind, and founded upon reasons of a purely technical description, it had long been settled law, that the words *dying without issue* (as where an estate of freehold or leasehold was devised to A., and *upon his dying without issue*, then over to B.), in general imported an *indefinite* failure of issue,—that is, a failure not merely at the death of the party whose issue were referred to, but at any subsequent period, however remote (*b*). But by the New Wills Act, such words were directed, for the future, to receive a more natural exposition, it being enacted (by sect. 29), that, "in any "devise or bequest of real or personal estate, the words "'die without issue,' or 'die without leaving issue,' or "'have no issue,' or any other words which may import "either a want or failure of issue of any person in his "lifetime or at the time of his death, or an indefinite "failure of his issue,—shall be construed to mean a want

(*a*) *In re Marsh, Mason* v. *Thorne*, 38 Ch. Div. 630; *In re Phillips, Robinson* v. *Burke*, 41 Ch. D. 417.

(*b*) Fearne by Butler, pp. 478, 480; *Foster* v. *Hayes*, 4 Ell. & Bl. 717; *Doe* d. *Cadogan* v. *Ewart*, 7 Ad. & El. 648.

" or failure of issue in the lifetime or at the death of such " person, and not an indefinite failure of his issue, unless " a contrary intention shall appear by the will, by reason " of such person having a prior estate tail, or of a pre- " ceding gift, being (without any implication arising from " such words) a limitation of an estate tail to such person " or issue, or otherwise" (*c*) ; but the provision does not extend " to cases where such words as aforesaid import if " no issue described in a preceding gift shall be born, or " if there shall be no issue who shall live to attain the age " or otherwise answer the description required for obtaining " a vested estate by a preceding gift to such issue."

IV. [As to the operation of a devise in conveying and limiting real estate :—A will, in regard to its operation on real estate, is considered not so much in the nature of a testament, as of a *conveyance* declaring the uses to which the land shall be subject (*d*) ; with this difference, however, that in other conveyances the *subscription* of the witnesses is not, in all cases, essential to the validity of the deed, though it is a prudent precaution (and one which in practice is invariably observed), in order to assist their memory when living, and to supply their evidence when dead ; but in a devise, such subscription is made absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up until after the death of the devisor.]

By a devise, estates may be limited with the same effect as by a conveyance operating under the Statute of Uses (*e*). Thus, a man may effectually devise not only an estate in possession, (that is, in possession immediately on the death of the testator when the will first takes effect,) or in remainder, but also a freehold *in futuro*, or a fee upon a

(*c*) *Dawson* v. *Small*, Law Rep., 9 Ch. App. 651.

(*d*) *Wyndham* v. *Chetwynd*, Burr. 429.

(*e*) 2 Bl. Com. 334; *Arthur* v. *Bokenham*, 11 Mod. 154.

fee (*scilicet*, either defeasibly or alternatively),—all which limitations (as we have seen) may be effectually made by way of executory use, though not in a conveyance at the common law. So a man may devise to his wife—as he may convey to her by way of use—though his conveyance to her at common law was inoperative (*f*). Yet as a devise is considered to be in the nature of a conveyance declaring uses, so uses are often expressly introduced into wills; and it has been the practice to introduce them in the same form as in conveyances under the 27 Hen. VIII. c. 10; but it has been doubted, whether that statute has any effect in the case of a devise (*g*),—for though where uses are expressly and formally declared by the will, it may often be inferred that the testator had the statute in view, and intended the conversion of the use into legal estate, according to its known mode of operation, yet it is rather by force of his *intention*, than of the statute itself, that the legal estate, in such cases, would be deemed to pass.

A devise by which any future estate is limited contrary to the rules of the common law, is called an *executory devise* (*h*); but upon the same principle to which we had before occasion to advert, in the case of a springing or shifting use, it used to be a rule that no limitation, capable of being considered as a remainder, should ever be construed as an executory devise (*i*); although now, as we have seen (*k*), they will in certain cases be construed as executory limitations if they will be supported thereby. And all "executory devises" are also subject, like springing and shifting uses, to the rule against *perpetuity* (*l*); and therefore, until the New Wills Act, it was held that if a chattel (real or personal) were bequeathed to A., and

(*f*) 2 Bl. Com. 334; Co. Litt. by Butler, 272 a, n. (1).

(*g*) 1 Sand. Uses, p. 196.

(*h*) Fearne by Butl. p. 386; 2 Bl. Com. 172.

(*i*) Fearne by Butl. pp. 386, 394, 525; *Doe* d. *Evers* v. *Challis*, 20 L. J. (Q. B.) 113.

(*k*) *Vide supra*, pp. 240, 385.

(*l*) 2 Bl. Com. 173, 334; Fearne by Butl. 430, 9th ed.; Co. Litt. by Butl. 271 b, n. (1), vii. 2.

upon his *dying without issue*, then to B., the limitation over to B. was void, as being too remote (*m*),—for such words imported (as we have just seen) an *indefinite* failure of issue; but in devises of the freehold, similarly worded, the objection of remoteness did not usually arise,—for, in general, the law gave effect, in this case, to the limitation over, by considering the estate of the first taker as amounting, by implication, to an estate *tail*,—a construction which was not admissible in the former case, by reason of there being no estate tail in a chattel (*n*),—and the ulterior estate was regarded as a *remainder*: which, as it might always be barred by the recovery of the tenant in tail, did not fall within the rule against perpetuity.

The conveyance by devise vests in the devisee *before and without entry* (subject, however, to his assenting to the devise) an actual freehold by construction of law (*o*),—a devise being similar in this respect to a conveyance under the Statute of Uses, but different from a descent, which does not vest in the heir an estate complete for all purposes, unless and until he has made entry on the lands descended. But the devisee may, of course, disclaim (*p*); which, as we have seen, the heir may not do.

(*m*) Fearne by Butl. p. 460; *Doe* v. *Ewart*, 7 Ad. & El. 648; *Doe* v. *Duesbury*, 8 M. & W. 531.

(*n*) 2 Bl. Com. 398.

(*o*) Co. Litt. 111 a; and see *Glass* v. *Richardson*, 2 De G. M. & G. 658; *Garland* v. *Mead*, L. R. 6 Q. B. 441.

(*p*) *Doe* d. *Winder* v. *Lawes*, 7 Ad. & Ell. 212.

CHAPTER XXI.

OF EXTRAORDINARY CONVEYANCES—OR THOSE BY MATTER OF RECORD.

We proceed to consider *Conveyances by matter of Record*,—which, being in use on particular and comparatively rare occasions, may therefore be designated extraordinary conveyances ; and they are—1. Private Acts of Parliament ; and 2. Royal Grants.

I. Private *Acts of Parliament* have been resorted to as a mode of assurance more frequently in modern than in antient times. [For it may sometimes happen that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of resulting trusts, springing uses, executory devises, and the like artificial contrivances ;] or it may be necessary, in settling an estate, to secure it against the claims of infants, or other persons under legal disabilities, —who are not, in general, bound by any judgments or decrees of the courts of justice. And in proper cases, private Acts of Parliament are of a very advantageous character ; and at the present day, acts of this character are carried through, in both houses, with great deliberation and caution,—particularly in the House of Lords, where it has been a not infrequent practice to have them referred to two of the judges, to examine and report on the facts alleged, and to settle all technical forms (*q*). [Nothing also is done without the consent, expressly given,

(*q*) May's Laws of Parl. pp. 820, 833, 8th ed.

[of all parties in being and capable of consenting, that have the remotest interest in the matter,—unless indeed such consent shall appear to be perversely, and without any reason, withheld ; and an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the Act ; and a general saving is constantly added at the close of the bill, of the rights and interests of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named ; though it hath been holden, that, even if such saving be omitted, the Act shall bind none but the parties (*r*).

A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute ; it is not printed or published among the other laws of the session ; and it hath been relieved against, when obtained by fraudulent suggestions (*s*)]. Formerly, too, it was subject in every case to this further distinction, that though all public statutes are noticed by the court *ex officio*, no private one was entitled to judicial notice unless specially set forth and pleaded ; and such is still the rule as to those passed up to 4th Feb. 1851, inclusive ; but by 52 & 53 Vict. c. 63, s. 9, repealing but in substance re-enacting 13 & 14 Vict. c. 21, s. 7, it is provided that every Act passed after the year 1850 shall be judicially taken notice of, unless the contrary be expressly provided and declared by the statute itself (*t*).

(*r*) 8 Rep. 138 a ; Godb. 171 ; *Chapman* v. *Brown*, 3 Burr. 1626.

(*s*) *M'Kenzie* v. *Stewart*, Dom. Proc. 13th March, 1754 ; *Biddulph* v. *Biddulph*, 4 Cru. Dig. 549.

(*t*) As to all private Acts, it may be observed that up to 25 Hen. 8 they were enrolled on the rolls of parliament ; but from that date until 32 Geo. 2, the *titles* only usually appear on the rolls. Under the existing practice, however, the titles are not now enrolled, but the Acts themselves are preserved at the Private Bill Office.

II. *Royal grants* are also matter of public record (*u*) ; [for, as St. Germyn says, the excellency of the sovereign is so high in the law, that no freehold may be given to, nor derived from, the crown, but by matter of record (*x*). And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the royal grants must pass, and be transcribed, and enrolled, in order that the same may be narrowly inspected by the officers of the crown, who will inform the sovereign if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, offices, or aught besides, are contained in charters, or *letters-patent*, that is, open letters, *literæ patentes*,—so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom ; and they are usually directed or addressed by the sovereign to all the subjects of the realm,—in which respect, they differ from certain other letters of the sovereign, which are also sealed with the great seal, but are directed to particular persons, and for particular purposes ; which, therefore, not being proper for public inspection, are closed up, and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*, and are recorded in the *close rolls*, in the same manner as the others are in the *patent rolls*.]

The course of proceeding formerly observed with respect to the making out of a grant by letters patent was in general as follows (*y*) :—They were, first, to pass by *bill*, prepared by the attorney-general and solicitor-general, in pursuance of a warrant from the crown, and thereafter signed (that is, superscribed at the top) with the sovereign's own *sign manual*, and sealed with the *privy signet*, which was always in the custody of the principal secretary of state ; and then sometimes the bill immediately passed under the great seal, in which case the patent was

(*u*) *Vide post*, bk. v. ch. xiii.
(*x*) Doct. and Stud. b. 1, d. 8.
(*y*) 2 Bl. Com. 343.

subscribed in these words, "*per ipsam reginam*, by the queen herself" (*z*). Otherwise, the course was to carry an extract of the bill to the keeper of the *privy seal*, who made out a writ or warrant thereupon to the Chancery,—so that the sign manual was the warrant to the privy seal, and the privy seal was the warrant to the great seal; and in this last case, the patent was subscribed, "*per breve de privato sigillo*, by writ of privy seal" (*a*). But the practice as to grants by patent was latterly greatly simplified by the statute 14 & 15 Vict. c. 82, which provided, that, in every case where any gift, grant, or writing whatsoever to be passed under the great seal would have before required a bill from the office of the signet or of the privy seal, her Majesty might, by warrant under the royal sign manual, addressed to the lord chancellor, command him to cause letters-patent to be passed under the great seal according to such warrant; and that such warrant should be prepared by the attorney-general or solicitor-general, and should set forth the proposed letters-patent, and should be countersigned by one of the principal secretaries of state, and sealed with the privy seal (*b*). Such was the general course of proceeding as established by that statute: but inasmuch as some letters-patent, writs, commissions, or other instruments, might, before the statute, have been passed under the great seal, by authority of the lord chancellor or otherwise, without passing through the offices of the signet and the privy seal, all these were excepted, by an express proviso, from its operation. There are also some royal grants or appointments which only pass through certain offices, as the admiralty, the home office, or treasury, under the authority of a *sign manual* without the confirmation of either the *signet*, the *great* or the *privy* seal; and to these of course the statute had no application (*c*). And now, under the Patents, Designs, and Trade

(*z*) 2 Rep. 17 b.

(*a*) 2 Rep. 17 b; 2 Inst. 555.

(*b*) By 40 & 41 Vict. c. 41, s. 4, *wafer* seals might be used.

(*c*) 25 & 26 Vict. c. 4.

Marks Act, 1883 (*d*), patents for inventions are simply sealed with the seal of the patent office ; and by the Great Seal Act, 1884 (*e*), it has been provided generally, that a warrant under the sign manual, countersigned by the lord chancellor or a secretary of state, or the lord high treasurer, or two of the treasury commissioners, shall be a sufficient authority for passing any instrument under the great seal, and that for the future no instrument need be passed under the privy seal ; but where any instrument might before the Act have been passed under the great seal by the fiat of the lord chancellor or otherwise without passing through any other office, it is to continue to be so passed.

[The manner of a grant by the crown (as above set forth), does not more differ from that by a subject, than the *construction* of such grants when made. For, 1. A grant made by the crown, *at the suit of the grantee*, shall be taken most beneficially for the crown, and against the party,—whereas the grant of a subject is construed most strongly *against* the grantor ; and it is usual therefore to insert in all royal grants, that they are made, not at the suit of the grantee, but "*ex speciali gratiâ, certâ scientiâ, et mero motu reginæ* (*aut regis*)" ; and then they have a more liberal construction (*f*), as is also the case where they are made upon a valuable consideration (*g*). 2. A subject's grant is construed to include many things besides what are expressed, if necessary for the operation of the grant (*h*) ; but the grant by the crown shall not enure to any other intent than that which is precisely expressed in the grant. 3. When it appears, from the face of the grant, that the crown is mistaken or deceived, either in matter of fact,

(*d*) 46 & 47 Vict. c. 57 ; 48 & 49 Vict. c. 63.

(*e*) 47 & 48 Vict. c. 30, repealing the 27 Hen. 8, c. 11 ; 14 & 15 Vict. c. 82 ; and the Great Seal Act, 1880 (43 & 44 Vict. c. 10), s. 3.

(*f*) Finch, L. 100 ; 10 Rep. 112.

(*g*) 6 Rep. 6 a.

(*h*) 1 Saund. by Wms. 323 a, n. (6) ; Co. Litt. 56 a ; Litt. s. 206.

[or in matter of law, as in case of false suggestion, misinformation, or misrecital, of former grants ; or if the royal title to the thing granted be different from what was supposed ; or if the grant be informal ; or if an estate be granted contrary to the rules of law,—in any of these cases the grant is absolutely void (*i*). For instance, if the crown grant lands to one and his *heirs male*, this is merely void,—for it shall not be an estate tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue ; neither is it a fee simple, as in common grants it would be, because it may reasonably be supposed, that the king meant to give no more than an estate tail (*k*) ; the grantee is therefore (if anything) nothing more than a tenant at will (*l*). And to prevent deceits being practised on the sovereign, with regard to the value of the estate granted, it was particularly provided by the 1 Hen. IV. c. 6, that no grant of the crown should be good, unless express mention was made of the real value of the lands in the grantee's petition for them.] As to the mode of proceeding for calling in question the validity of the crown's grant, it is in general by writ (or action) of *scire facias* at suit of the crown, issued at the instance, or at least with the sanction, of the attorney or solicitor-general (*m*) ; but as regards letters-patent for inventions, the proceeding by *scire facias* to repeal the patent has been abolished, and in lieu thereof a petition to the Court is now provided, praying for the revocation (*n*).

Lastly, we may observe with respect to the *subject-matter* of royal grants, that—in connection with the provision now usually made by Parliament, for the support of the royal dignity—restrictions have been placed by legislative

(*i*) Freem. 172 ; *Gledstanes* v. *Earl of Sandwich*, 4 Man. & G. 995.

(*k*) Finch, 101, 102.

(*l*) Bro. Abr. tit. Estates, 33 ; tit. Patents, 104 ; Dyer, 270 ; Dav. 45.

(*m*) 12 & 13 Vict. c. 102, s. 29, &c.

(*n*) 46 & 47 Vict. c. 57, s. 26.

enactment on the alienation of the royal domains (*o*) ; the general effect of which (though subject to a variety of exceptions) is to make such alienations unlawful for any longer period than thirty-one years (*p*). But the private property of the Queen—that is, any estate purchased out of the privy purse, or coming to her Majesty, her heirs or successors, by descent or otherwise, from persons not being kings or queens of the realm—may be disposed of by her as freely as any estate belonging to a private individual (*q*).

(*o*) 1 Anne, c. 1 ; 10 Anne, c. 28; 10 Geo. 4, c. 50 ; 1 &2 Vict. c. 95, s. 4.

(*p*) See also 10 Geo. 4, c. 50, s. 125 (as to making a parliamentary return of all crown grants), and 38 & 39 Vict. c. 87, ss. 65, 66 (as to the registration of all such grants) ; and see generally 15 & 16 Vict. c. 62 ; 29 & 30 Vict. c. 62 ; and 57 & 58 Vict. c. 43, being respectively the Crown Lands Acts, 1852, 1866, and 1894.

(*q*) 39 & 40 Geo. 3, c. 88 (amended by 47 Geo. 3, sess. 2, c. 24) ; 4 Geo. 4, c. 18 ; 25 & 26 Vict. c. 37 ; 36 & 37 Vict. c. 61.

CHAPTER XXII.

OF COPYHOLDS.

Our attention has been hitherto confined to freehold hereditaments ; and we will now proceed to consider copyhold hereditaments,—I. The general nature of copyhold estates ; and II. Certain incidents peculiar to those estates, and not applicable to such as are of free tenure.

[I. As to the general nature of these estates,—On referring to what we before said of copyhold, we may recollect, that it is only in *manors* that they are to be found,—all copyholds being, from their nature, necessarily parcel of some manor ; and it is by the immemorial custom of the particular manor, that the nature of the copyholder's interest must always be regulated. In some manors, where the custom hath been to permit the heir to succeed to the ancestor, the estates are called copyholds of inheritance ; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life or years only (*r*) ; but though the interest of the copyholder may be thus in fee or for life, and consequently may partake of the nature of freehold in respect of the *quantity of estate*, it is nevertheless, for want of the remaining ingredient, (viz. that of free tenure,) no *freehold*. Indeed, in every case of copyhold, the law still distinguishes between the strictly legal, and the customary, estate ; for as regards the former, it supposes the seisin and freehold of the land to be vested in the lord, of whose *demesnes* the copyhold is properly parcel ; and the copyholder is deemed to be mere tenant at

(*r*) 2 Bl. Com. 97 ; Co. Litt. 52 b.

[will (*s*) ; but as he is tenant at will *according to the custom*, that is, to hold in fee, or for life, or years, (as the case may be,) it considers him as having a customary estate to that extent, and which it is out of the power of the lord to defeat or encroach upon (*t*) ; and the copyholder therefore owes fealty to his lord,—an obligation from which a mere tenant at will is exempt (*u*).

In the enumeration of the estates of which a copyhold may consist it will be observed, that we have not included estates *tail* : it being only by particular custom that copyholds are capable of being entailed (*x*). For the statute *De donis* has been held not to extend to lands of that tenure : from which it follows, that a limitation to a man and "the heirs of his body," in a copyhold, will ordinarily create not an estate tail, but a fee simple conditional at common law (*y*),—although, where there is a custom to entail, such a limitation will confer an estate in tail.

Not only with regard to the quantity of interest, (as being in fee, for life, or for years,) but with regard also to the various modifications to which that interest may be subject, the nature of a copyholder's estate in general resembles that of an estate held in free tenure (*z*). But as to estates in dower and by the curtesy, copyholds are not, of common right, subject to either of these incidents (*a*), —though they may each obtain, and in fact do very frequently obtain (the former under the name of *free-bench*), by the special custom of particular manors (*b*). And to this we may add, that as the mode in which copyholds are conveyed—of which we shall speak hereafter—differs from

(*s*) *Dearden* v. *Evans*, 5 Mee. & W. 11 ; *Duke of Portland* v. *Hill*, Law Rep., 2 Eq. Ca. 765.

(*t*) *Brown's Case*, 4 Rep. 21 ; Co. Cop. 5, 58 ; Litt. s. 92, Trespass ; Hist. Eng. Law, by Reeves, vol. iii. p. 312.

(*u*) *Vide sup.* p. 199.

(*x*) Co. Litt. 60 b ; 2 Bl. Com. 113.

(*y*) *Doe* v. *Clark*, 5 B. & Ald. 458.

(*z*) Co. Cop. 110 ; Gilb. Ten. 258 ; 2 B. & Ad. 440.

(*a*) 4 Rep. 22 a.

(*b*) Co. Cop. 110, 111 ; Gilb. Ten. 161.

[any of those which are applicable to freeholds, so the limitation of an estate in copyhold is free from some of the restraints imposed, by the ordinary rules of the common law, in the case of freeholds. Thus, in a conveyance of a copyhold estate *inter vivos*, though no assistance can be here derived from the Statute of Uses,—yet an estate in fee or for life may be limited *in futuro* ; or a fee may be limited upon a fee (*scilicet*, defeasibly or alternatively) ; or a man may convey to himself, or to his wife (*c*) ; and a copyhold has always been capable of alienation by will.

II. Next, as to the incidents of a copyhold estate,—These regard, first, the estate itself ; and, secondly, the manner of its acquisition, or of making and transmitting title to it.

First, As to the copyhold estate itself :—A copyholder, even where his interest is in fee, has no right (except where warranted by the custom) to commit *waste*,—for example, to cut down timber unless for reasonable botes or estovers, or to dig for minerals (*d*) ;—for the law considers him, in these respects, in the light of a tenant at will. And yet this restriction is attended with no corresponding benefit to the lord ; for the law does not allow the lord (unless there be a special custom for the purpose) to enter on the land to take the timber or minerals to his own use, without the consent of the copyholder,—whose possession, though in strictness a tenancy at will, is nevertheless protected from all invasion (*e*). By such waste, and by many other acts of a wrongful kind,—such as an alienation in fee, or for life, by a common law mode of conveyance proper to freehold, and not applicable to the copyhold tenure—a demise for more than one year, without the lord's licence—a refusal to perform the proper services,—or a disclaimer of his

(*c*) *Boddington* v. *Abernethy*, 5 B. & C. 782 ; Co. Cop. 81.

(*d*) *Duke of Portland* v. *Hill*, Law Rep. 2 Eq. Ca. 765.

(*e*) *Whitechurch* v. *Holworthy*, 4 Mau. & Sel. 340 ; *Lewis* v. *Braithwaite*, 2 Barn. & Adol. 438.

[tenancy in open court,—the copyholder forfeits his estate to the lord (*f*).

Moreover, the copyholder is ordinarily subject to *quit rents* and *fines*, and, sometimes, to *heriots*. The nature of a "quit rent" will be noticed in the following chapter, when we shall have occasion to consider the subject of *rents* in general. And as regards "fines," these are payments due, by the custom of most manors, to the lord, upon every descent or alienation of a copyhold tenement; and they accrue by force of the *admittance* to which we shall presently refer; but are not in general allowed to a larger amount than (at the most) two years' improved value of the land, after deducting the quit rent. In the case of "tenants in common," this fine is paid apportionably—that is, each pays a separate fine according to his share (*g*); but "joint tenants" and "co-parceners" pay a single fine for all (*h*). And the case of joint tenants is an exception to the general rule as to amount; for, on their admittance, the course is to allow two years' value for the first life, half of that on the second, and half of that last sum on the third; and so according to this descending series, whatever may be the number of tenants (*i*); for as such tenants are entitled to succeed each other by mere survivorship, and without a new admittance, (without which no new fine could be due,) the application of the general rule to this case would operate unfairly on the lord. Occasionally also, double fines are payable, *e.g.*, upon an admittance on a second devolution of the estate when no admittance has been taken on the first devolution (*k*); but as between

(*f*) 1 Watk. Cop. 326; 2 Bl. Com. 284; Scriven on Copyholds, 7th ed., by Brown, pp. 208—230.

(*g*) *Queen* v. *Manor of Everdon*, 16 L. J. (Q. B.) 18; *Queen* v. *Eton College*, 8 Q. B. 526.

(*h*) *R.* v. *Manor of Bonsall*, 3 B. & Cress. 175; *Douglas* v. *Earl of Dysart*, 10 C. B. (N.S.) 695

(*i*) *Wilson* v. *Hoare*, 2 Barn. & Adol. 350; S. C. 10 Ad. & El. 236; *Sheppard* v. *Woodford*, 5 Mee. & W. 608.

(*k*) *Londesborough* v. *Foster*, 3 B. & S. 805; *Paterson* v. *Paterson*, Law Rep., 2 Eq. Ca. 31; *Naylor and Spendla's Contract*, 34 Ch. D. 217; *Hall* v. *Bromley*, 35 Ch. Div. 642.

[tenants for life and remaindermen, a single fine only is in general payable, and it is apportioned between them, the admission of the tenant for life enuring also, in general, as the admission of the remaindermen (*l*).

With respect to "heriots," they also are a tribute to the lord of whom the tenement is held; and they are usually divided into two sorts, heriot service and heriot custom (*m*). Heriots of the nature of heriot service are such as are due upon a special reservation in a grant or lease of lands; but they do not usually occur,—except where they form part of the services by which some *particular* tenement within the manor has been held from time immemorial, and which may therefore be supposed to have been reserved by the grant of it originally made. Heriots of the kind called heriot custom, on the other hand, arise upon no special reservation whatsoever, but depend merely upon custom, being founded on a *general* usage within some manor, from time immemorial: as that every tenement within the manor has always paid, under certain circumstances, a heriot to the lord (*n*). A heriot may be due either from the free (*o*) or from the copyhold tenants of a manor (*p*),—even where it is a heriot service (*q*); and it may accrue either in respect of the death or alienation of the tenant; but it is claimed more ordinarily in respect of the death (*r*). It is sometimes the best live beast (*averium*) of which the tenant dies possessed (*s*); sometimes the best inanimate good, under which a jewel or piece of plate may be included; but it is always a personal chattel, which, immediately upon the death of the tenant who was the owner of it, being ascertained by the option of the lord, becomes

(*l*) *Dean of Ely* v. *Caldecot*, 8 Bing. 439; *Phypers* v. *Eburn*, 3 Bing. N. C. 250; *Garland* v. *Aston*, 3 H. & N. 390.

(*m*) 2 Bl. Com. 422.

(*n*) Hallam's Mid. Ages, vol. ii. p. 416; and Selden's Works, vol. ii. p. 1620.

(*o*) *Damerell* v. *Protheroe*, 10 Q.B. 20; *Lord Zouche* v. *Dalbiac*, Law Rep. 10 Exch. 172.

(*p*) Bl. Com. *ubi sup.*

(*q*) *Western* v. *Bailey*, [1897] 1 Q. B. 86.

(*r*) 2 Watk. Cop. 135, 145.

(*s*) Bract. l. ii. ch. 36, s. 9.

[vested in the lord as his property, and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due ; and therefore on the death of a *feme covert*, no heriot can (or originally could) be taken,—for she can (or originally could) have no ownership in things personal (*t*). In some places there is a customary composition in money,—as ten or twenty shillings,—in lieu of a heriot ; by which the lord and tenant are both bound, if it be an indisputably antient custom ; but a new composition of this sort will not bind the representatives of either party (*u*). And if the tenement should happen to be at any time divided into distinct shares, either by becoming vested in tenants in common, or by alienation of parcel in severalty, the heriot is *multiplied* accordingly (*x*) ; though upon the subsequent reunion of the parts in a single owner, the multiplication (at least in the case of a tenancy in common) ceases (*y*) ; but on the alienation of joint tenants,—in the case of a manor in which a heriot is payable on alienation,—a single heriot only is due (*z*).

A copyhold estate was not assets in the hands of the heir or devisee, and was consequently exempt, after the tenant's death, from the claims of his creditors (*a*) ; nor could any part of it be taken in execution, even during his life, upon an *elegit* (*b*).] But these anomalies are now swept away ; for by the 3 & 4 Will. IV. c. 104, a man's copyhold or customary-hold estate (not charged with or devised subject to the payment of his debts) was made, equally with his freehold, *assets in equity* ; and by the 1 & 2 Vict. c. 110, s. 11, it was made equally liable with freehold hereditaments to be seized in execution under an elegit.

(*t*) Hob. 60.

(*u*) Co. Cop. s. 31.

(*x*) 2 Watk. Cop. 149, 159; *Garland* v. *Jekyll*, 2 Bing. 273.

(*y*) *Attree* v. *Scutt*, 6 East, 476; *Garland* v. *Jekyll*, 2 Bing. 273.

(*z*) *Padwick* v. *Tyndale*, 1 E. & E. 184.

(*a*) 4 Rep. 22 a ; 1 Watk. Cop. 224.

(*b*) 2 Eq. Ca. Ab. 226, pl. 6; 1 Watk. Cop. 224.

A copyhold estate may be *enfranchised*, *i.e.*, converted from the base tenure into free ; and that, either by conveyance from the lord to the tenant of the freehold estate in the copyhold premises, or by a release of the seignorial estate and rights (*c*),—the effect in either case being, that the tenant thereafter no longer holds by base, but by free tenure (*d*) : from which this consequence also follows, that the tenement is discharged from all copyhold burthens to which it was before subject (*e*); and this further consequence was commonly reputed to follow, namely, that the enfranchised tenant thereafter held, not of his old lord, but of the lord above ; but for the future, in the case at least of enfranchisements effected under the Copyhold Act, 1887 (*f*), s. 4, or now under the Copyhold Act, 1894 (*g*), s. 21, he now holds, although by free tenure, of the same old lord. And by the last-mentioned Act,—which repeats the like provisions contained in the earlier Copyhold Acts, and which were also contained in the Copyhold Act, 1887,—freehold lands which are subject to heriots may also be enfranchised therefrom.

Secondly, as to the manner of acquiring a copyhold, or of making and transmitting title to it :—Any attempt to transfer a copyhold, either for an estate of inheritance or for life, by any freehold assurance (unless where such assurance is specifically appointed by some statute, is in general attended with no other effect but to occasion a forfeiture to the lord. [Yet, by the lord's *licence*, the copyholder may (by a common law deed) demise for a term of years (*h*), and (even without his licence) for a single year, or (if the custom so want) for three years ; and custom and the indulgence of the law, which favours liberty, also allow him to exercise a substantial, though

(*c*) 1 Watk. Cop. 362.
(*d*) *Ibid.*, 367.
(*e*) 1 Watk. Cop. 368.
(*f*) 50 & 51 Vict. c. 73.
(*g*) 57 & 58 Vict. c. 46 ; Brown's Copyhold Enfranchisement Acts.
(*h*) 1 Watk. Cop. 302.

[indirect, right of alienation to any extent whatever, whether in fee, for life, or for years, under colour of a *surrender* of his interest to the lord, and an *admittance* or grant by the latter, *de novo*, to the tenant's nominee,—such admittance being attended with those ceremonies of investiture, which marked in former days the original donation of a fief.] And under the express provision of particular statutes, he may (even by a common law deed) convey the whole fee simple estate (so called) in the copyhold tenement,—*e.g.*, by deed poll under the Lands Clauses Act, 1845 (*i*), or by an ordinary deed under the Settled Land Act, 1882 (*k*) ; but save as so enabled by statute, he cannot (by any common law mode of assurance, other than by his will) convey the copyhold estate (*l*) ; but he must for that purpose proceed by surrender and admittance.

The nature of a surrender and admittance is, in a general point of view, and according to the custom of most manors, as follows : [the tenant comes to the steward of the manor, either in court, or (if the custom permits) out of court ; or else to two customary tenants of the manor, or to a single tenant provided there be also a custom to warrant it (*m*),—and then by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his steward, or of the two tenants, or tenant, all his interest in and title to the estate,—in order that the same may be again granted out by the lord to such persons and for such uses as are named in the surrender, and as the custom of the manor will warrant (*n*). And upon such surrender, the lord, by his steward, grants the same land again to the surrenderor's nominee (the surrenderee), to hold by the antient rents and customary services ; and

(*i*) 8 & 9 Vict. c. 18, s. 95.

(*k*) 45 & 46 Vict. c. 38, s. 20.

(*l*) 2 Watk. Cop. 119 ; *Dimes* v. *Grand Junction Canal*, 9 Q. B. 669 ; 3 H. L. Ca. 794.

(*m*) 1 Watk. Cop. 78.

(*n*) *Rowden* v. *Maltster*, Cro. Car. 42 ; *Rigden* v. *Vallier*, 2 Ves. 257.

[thereupon admits the surrenderee as tenant to the copyhold according to the form and effect of the surrender, by delivering up to the same tenant the rod, or glove, or the like, in the name and as the symbol of corporeal seisin of the lands and tenements; upon which admission he pays a fine to the lord, according to the custom of the manor (*o*).] And the steward is, by the Stamp Act, 1891 (*p*), ss. 65—68, under a duty to see that the surrender or admittance (or the copy thereof which he delivers out) is duly stamped; and he may (before he accepts the surrender or grants the admittance) require payment of the amount of such stamp and of his lawful fees.

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts, the surrender and the admittance: considered with reference, not to their form (for of that enough has been said) but with reference to the doctrines and principles to which they are respectively subject.

1. [A "surrender" is rather a manifestation of the alienor's intention, than a transfer of any interest in possession; for until admittance of the surrenderee, the lord still taketh notice of the surrenderor, as his tenant; and the surrenderor still receives the profits of the land to his own use, and shall discharge all services due to the lord; and the lord cannot take notice of the surrenderee for any purpose (*q*),—not even although he should have personally accepted the surrender (*r*). Yet the interest remains in the surrenderor not absolutely, but *sub modo*; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender;] and he is considered as a trustee for the surrenderee, who has an equitable interest capable of being devised or otherwise assigned (*s*); and the

(*o*) 2 Bl. Com. p. 365.

(*p*) 54 & 55 Vict. c. 39; *Cole* v. *Jackson*, 5 Hare, 51.

(*q*) *Lord Wellesley* v. *Withers*, 4 Ell. & Bl. 750.

(*r*) *Doe* v. *Tofield*, 11 East, 246.

(*s*) 1 Watk. Cop. 102.

surrenderee has a right to call upon the lord to admit him, and in the event of his refusal may compel him to do so by mandamus or other appropriate proceeding in the High Court of Justice (*t*). But no estate whatever is vested in the surrenderee as *copyhold tenant*, before admittance; [and if he enters without, he is, strictly speaking, a trespasser,—unless the surrender should operate as a licence to excuse the trespass. And if, on such entry, he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed as if by relation (*u*); for though he be admitted in pursuance of the original surrender, and thereby acquire afterwards a sufficient and plenary interest as absolute owner, yet his surrender to another previous to his own admittance is absolutely void *ab initio*,—because, at the time of such surrender, he had but a possibility of an interest, and could therefore transfer nothing by the purported surrender; and no subsequent admittance can make an act good which was *ab initio* void.] But an unadmitted devisee may now (under the 7 Will. IV. & 1 Vict. c. 26, ss. 3, 4) make an effectual devise, his devisee paying a double fine, together with double fees and double stamps.

[2. "Admittance" is the last stage or perfection of the copyhold assurance; and it may be either an admittance upon a surrender (or devise) by the former tenant or an admittance upon a descent from the ancestor; and in both these, the lord is a mere instrument, that is to say,—just as no manner of interest passes into him by the surrender (or devise) or by the death of the tenant, so no interest passes out of him by the act of admittance; and the claim of the tenant who is admitted is solely under him that made the surrender, or under the ancestor (*x*). And, therefore, neither in the one case nor in the other is any

(*t*) *Queen* v. *Lord Wellesley*, 2 Ell. & Bl. 924.

(*u*) *Doe* v. *Tofield*, 11 East, 246, 251.

(*x*) 2 Bl. Com. 370; 4 Rep. 27; Co. Litt. 59.

[respect had to the quality or quantity of the lord's estate in the manor; for it is immaterial whether he be tenant in fee or for years, or whether he be in possession by right or by wrong; and the admittances made by him shall not be impeached on account of his title, because they are ministerial acts, which every lord in possession is bound to perform (*y*).

Admittances, however, upon surrender differ from admittances upon descent, in this, that, by surrender, nothing beyond the mere possibility of an interest is vested in the surrenderee, before admittance; but, upon descent, the heir is tenant by copy immediately upon the death of his ancestor,—not indeed to all intents and purposes, for he cannot be sworn on the *homage*, nor maintain an action in the lord's court, as tenant; but to most intents the law taketh notice of him as a perfect tenant of the land, instantly upon the death of his ancestor. For example, he may, before admittance, enter into the lands, take the profits, punish trespassers, devise the land descended on him (*z*); nay, upon satisfying the lord for his *fine* due upon the descent, he may surrender into the hands of the lord to whatever use he pleases; for which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine; and not so much necessary for the strengthening and completing of the heir's title. Hence, indeed, an observation might arise, that, if the benefit which the heir is to receive by the admittance is not equal to the charge of the fine, he will never come in and be admitted to his copyhold in court,—and so the lord may be deprived of his fine; but to this we may reply in the words of Sir E. Coke (*a*)—"I assure myself, if it were in the election of the heir to "be admitted, or not to be admitted, he would be best "contented without admittance; but the custom in every

(*y*) 4 Rep. 27; 1 Rep. 140.

(*z*) *Right* v. *Banks*, 3 Barn. & Adol. 644; *Doe* v. *Wilson*, 5 Ad. & El. 321; 7 Will. 4 & 1 Vict. c. 26, s. 3.

(*a*) Co. Cop. s. 41.

[" manor is in this point compulsory: For either upon pain " of forfeiture of the copyhold, or of incurring some great " penalty, the heirs of copyholders are enforced in every " manor to come into court and be admitted according to " the custom, within a short time after notice given of " their ancestor's decease."] Accordingly (by the custom of most manors), if no person come in to be admitted in the place of a deceased tenant, the lord of the manor, after making due proclamation at three consecutive customary courts, may seize the land into his own hands, *quousque* (that is, *until*) some person claims to be admitted (*b*); and by reason of the difficulty sometimes experienced by lords in procuring tenants to be admitted, *e.g.*, when they are infants or married women, it has been provided by 11 Geo. IV. & 1 Will. IV. c. 65, that the lord may (on their failure to come in and be admitted) himself appoint an attorney for them to take admittance and may admit them by such attorney accordingly, and proceed thereupon to recover his fine; and the like provisions are applicable also to the case of lunatic copyholders (*c*).

But though, in the case of an admittance upon surrender, no copyhold estate is vested in surrenderee until he is admitted, and it is distinguishable in this respect from an admittance upon descent; yet it is material to observe, that even an admittance upon surrender, when made, has a retrospective relation, in point of time, to the surrender itself; and therefore if the surrenderor dies after the surrender, and before admittance, though his heir will take by descent in the interim, yet on the admittance of the surrenderee, the heir's estate will be defeated (*d*). And in conclusion, we should observe that it is only the legal estate that is considered upon a surrender and

(*b*) 1 Watk. Cop. 290; Scriven on Copyholds, 7th ed., by Brown, pp. 121—146.

(*c*) 53 Vict. c. 5, ss. 125, 126, repealing, but re-enacting, 16 & 17 Vict. c. 70.

(*d*) 1 Watk. Cop. 103; *Doe* v. *Hall*, 16 East, 208.

admittance (*e*); and that the steward may reject any surrender which purports to disclose any trust (*f*).

[Such is, in general, the nature of a surrender and admittance, in the simplest form; and the only variations upon the proceeding, which it is material at present to notice, relate to a conveyance by way of mortgage. Here the surrender is made upon *condition* that the money remains unpaid at the time appointed; but in the meantime no admittance takes place,—at least, in general; and if the money be then paid, the surrender not having been perfected by admittance, is void without further ceremony; nor is it the usual course to complete the copyhold estate by admittance, even supposing the money to remain unpaid, unless the mortgagee wishes to take possession; but the conditional surrender constitutes the only security, and continues to do so until the mortgage is satisfied; and an entry of such satisfaction is then made on the court rolls, after which the original title of the mortgagor is considered as remaining in full force (*g*).

The admittances of which we have hitherto spoken are those used to complete an inchoate title by surrender or descent. It is to be observed, however, that there is another kind of admittance, viz., that which is connected with an original voluntary grant from the lord himself, and not with any preceding surrender or devise or descent (*h*); and this occurs chiefly in the case where the lord has himself acquired the copyhold interest, in consequence of some escheat, forfeiture, descent, surrender to his own use, or other circumstance, so that the freehold and copyhold interest are united in his person (*i*). In such latter case, the lord may, if he thinks proper, grant the lands out *de novo* to hold by copy (*k*); but if he does this,

(*e*) *Hall* v. *Bromley*, 35 Ch. D. 642.

(*f*) *Flack* v. *Downing College*, 13 C. B. 945.

(*g*) 1 Watk. Cop. 116, 117.

(*h*) 2 Bl. Com. 370.

(*i*) 1 Watk. Cop. 36, 39, 359, 361, 423.

(*k*) 1 Watk. Cop. 93, 361.

[he is bound to observe the antient custom precisely in every point, and can neither in tenure nor in estate introduce any kind of alteration,—for that were to create a new copyhold, which, as this tenure depends on immemorial custom, cannot be done. Thus, if a copyhold for life falls into the lord's hands and he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects (*l*) ; nor can he charge or encumber, in any way, the tenant's estate so granted (*m*).

The lord may also, where there is a special custom in the manor to that effect, make grants of portions of the *waste*, to be held for the first time by copy of court roll ; but a custom to grant out every part of the waste without restriction, would be illegal, as trenching too much upon the general common right of the tenants (*n*) ; and to the validity of the grant of any portion, the assent of the *homage* is, by the custom of some manors, essential ;] also, such grants cannot any longer be made in any case, unless with the consent of the Board of Agriculture, Land Commissioners' Department ; and all such grants so made are now in the nature of freeholds and not of copyholds (*o*).

[Again, admittance may also take place in the case of a devise ; for a copyhold estate is now as devisable by will as a freehold. Formerly, copyholds were not directly devisable, even after lands of freehold tenure had become so ; but when a man wished to devise his copyhold, he made a surrender of it *to the use of his will*, and afterwards in his will designated the person to be admitted as devisee (*p*) ; and, except by special custom, a devise

(*l*) Co. Cop. s. 41.

(*m*) 8 Rep. 63.

(*n*) *Lord Northwick* v. *Stanway*, 3 Bos. & Pul. 346 ; *Badger* v. *Ford*, 3 B. & Ald. 153.

(*o*) 57 & 58 Vict. c. 46, s. 81, repeating the like provision contained in the 50 & 51 Vict. c. 73, s. 6 ; and see Brown's Copyhold Enfranchisement Acts, pp. 340, 341.

(*p*) Co. Cop. s. 36.

without a previous surrender of this kind was inoperative (*q*). However, by 55 Geo. III. c. 192 (passed 12th July, 1815, and commonly called Preston's Act), every disposition made by will, by a person dying after the passing of that Act, was made as effectual *without* a surrender to the use of his will, as it would have been if such a surrender had taken place (*r*) ; and so, by the New Wills Act (repealing 55 Geo. III. c. 192, except as to wills made before 1st January, 1838), it is provided that all the *real estate* of the testator may be devised ; and under that description, all his copyholds, though he should not have surrendered them to the use of his will, nor have even been admitted to them himself, are expressly included (*s*).

In manors where a custom to entail existed, an estate tail might have been barred by a customary recovery, founded on a fictitious action in the lord's court, according to the analogy of a common recovery in the Court of Common Pleas (*t*) ; or such customary estate tail might (according as the custom was) have been barred by a surrender (*u*) ; and now, generally, by the 3 & 4 Will. IV. c. 74, a disposition by tenant in tail of the legal estate in a copyhold, shall in every case be by surrender (*x*),—subject to provisions as to the consent of the protector of the settlement (where there is one), analogous to those which the statute introduced in relation to the disentailing of freehold lands (*y*) : but the surrender requires no enrolment, otherwise than by entry on the court rolls (*z*). And with respect to the copyholds of a *married woman* (tenant in tail), she is to pass her estate by surrender as

(*q*) 1 Watk. Cop. 122; *Cuthbert* v. *Lempriere*, 3 M. & S. 158.

(*r*) *Glasse* v. *Richardson*, 2 De G., M'N. & G. 659; *Traherne* v. *Gardner*, 5 Ell. & Bl. 913.

(*s*) 7 Will. 4 & 1 Vict. c. 26, s. 3; *Garland* v. *Mead*, Law Rep., 6 Q. B. 441.

(*t*) *Doe* v. *Dauncey*, 7 Taunt. 674; 1 Watk. Cop. 161.

(*u*) *Doe* v. *Dauncey*, 7 Taunt. 678; 1 Watk. Cop. 178.

(*x*) 3 & 4 Will. 4, c. 74, s. 50.

(*y*) Sects. 40, 51, 52, 90.

(*z*) Sect. 54.

before the statute, *i.e.*, by the surrender of herself and her husband, she being at the same time examined apart by the steward (*a*); while with respect to her copyholds of which she is not tenant in tail, she may by deed acknowledged, and with the concurrence of her husband, convey her estate, or extinguish any interest or power vested in her, as effectually as if she were a *feme sole*, that provision, however, not extending to her legal estate in any case in which the same object could, before the Act, have been effected by surrender.

The preceding remarks relate, it will be observed, to the manner of conveying the *legal* estate in copyhold lands; for with regard to *equitable* interests in lands of this tenure, they do not in general pass by surrender,—none but the owner of the legal estate being tenant to the lord, nor consequently entitled to surrender (*b*); but such equitable interests pass by any ordinary mode of conveyance sufficient to pass an equitable interest in freeholds (*c*). But as regards equitable *estates tail* (whether of married women or of others), and as regards also the equitable estates of *married women not tenants in tail*, it is provided by the 3 & 4 Will. IV. c. 74, that they shall pass either by surrender or by disentailing or other deed, attended with the same formalities in general which are prescribed by that Act with reference to transactions affecting legal estates (*d*).

It now remains to consider the provisions of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), which has repealed all the earlier Copyhold Acts, 1845 to 1887, being the statutes 4 & 5 Vict. c. 35, 6 & 7 Vict. c. 23, 7 & 8 Vict. c. 55, 15 & 16 Vict. c. 51, 21 & 22 Vict. c. 94, 23 & 24 Vict. c. 59, 31 & 32 Vict. c. 89, and 50 & 51 Vict. c. 73, and has consolidated their provisions, or such of these provisions as it was thought desirable to retain.

(*a*) 1 Watk. Cop. 63; *Driver* v. *Thompson*, 4 Taunt. 294; 3 & 4 Will. 4, c. 74, s. 77.

(*b*) 1 Watk. Cop. 60.

(*c*) 1 Watk. Cop. 60.

(*d*) Sects. 50, 53, 77, 90.

The provisions of the earlier Acts had in view three principal objects, that is to say, firstly, to enable lords and tenants to effect, by agreements subject to the Acts, the commutation of the manorial burdens and other restrictions incident to the copyhold tenure as such; secondly, to improve in certain particulars the law of copyholds generally; and thirdly, and chiefly, to enable the parties or either of them to procure the conversion of the copyhold into freehold tenure, or, in other words, to procure an enfranchisement of the copyhold hereditament.

In promotion of these views, the earlier Acts established a Board of "Copyhold Commissioners" (*e*), now merged in the Board of Agriculture (*f*); and they enacted, Firstly, with regard to *commutations*,—that by way of a general scheme for the whole manor, the future rents, fines, and heriots, and the lord's right in timber, and also (if so expressed) in mines and minerals, might in all cases be *commuted* by agreement, the parties to such agreement being respectively interested to the extent of three-fourths at least in value, and the number of the tenants parties to the agreement being, at least three-fourths of the whole, and all ecclesiastical and other corporations and patrons of livings being made parties to the agreement, and the commutation being afterwards confirmed by the Commissioners (*g*). And although such *general* commutations latterly ceased to be made, still *particular* commutations between the lord of the manor and any one or more of his tenants, might still have been made and in fact continued to be made, and (after confirmation by the commissioners) were binding on the parties and on all other persons connected with them in title,—notice having been given to the persons next entitled in remainder, reversion, or expectancy,—who were permitted to urge before the

(*e*) 4 & 5 Vict. c. 35, s. 2.
(*f*) 52 & 53 Vict. c. 30; 57 & 58 Vict. c. 46, ss. 90—93.
(*g*) 4 & 5 Vict. c. 35, ss. 13, 22, 23.

commissioners any objection to the proposed arrangement (*h*). And after a commutation duly effected, the lands, although still remaining copyhold for most purposes, ceased to be subject to any customary mode of descent; or to any custom relating to dower, freebench, or tenancy by the curtesy, except as to persons married before the commutation took place: and became liable, as regards all those matters, to the same law as lands held in free and common socage (*i*). But even these particular commutations have now ceased to be made, and the Copyhold Act, 1894, contains no provision regarding them; and as regards the general commutations above referred to (and which have sometimes been called commutations by apportionment), that Act (by sect. 100) merely recognizes the continuing validity of all past commutations, and (by sect. 63) provides for their being put in evidence, and renders recitals and statements contained therein sufficient evidence of the facts recited and stated.

Secondly, certain improvements in the copyhold tenure were introduced by the earlier Copyhold Acts, chiefly by the Copyhold Act, 1841, and these improvements have been continued by the Copyhold Act, 1894. Thus, to remove doubts before existing on the subject, it is provided, that it shall be lawful for the courts to make partition of copyhold lands, as well as of lands of freehold tenure (*k*),—and to do so, by the like order as in the case of freehold lands (*l*). And to obviate certain inconveniences previously attaching to the practice upon surrenders, admittances, and grants, it is enacted, that lords of manors (or their stewards or deputy stewards,) may hold customary courts, though there should be no copyhold tenant at the time, or none should be present; and may grant lands to be held by copy, and also admit to lands to be held by copy, at any time or place (whether within or without the manor), and

(*h*) 4 & 5 Vict. c. 35, s. 52.
(*i*) Sect. 79.
(*k*) Sect. 75.
(*l*) 57 & 58 Vict. c. 46, s. 87.

without holding a court (*m*). And whereas, before these statutes, it was in many cases necessary that a surrender, or other act *out* of court, should be afterwards *presented* in court by the homage, or tenants of the manor there assembled (*n*),—it is provided, that every copy of a surrender, will, or codicil delivered to the lord, steward, or deputy, and every grant and admission, shall be forthwith entered on the court rolls of the manor; and that such entry shall be taken to be an entry in pursuance of a presentment; and that it shall not be essential in any case to the validity of an admission, that a presentment should be made of the surrender, or other matter in consequence of which the admission was granted (*o*). It is provided, however, that when, by the custom of any manor, the lord is authorized, with the consent of the homage, to grant parcels of the waste to be held by copy, the consent of the homage assembled at a customary court, duly summoned and held according to the custom, shall still be necessary (*p*). And whereas by the custom of some manors, a licence from the lord to alienc was required, and in some of these cases lords were restrained, by the custom, from granting licences to their tenants to aliene their antient tenements, otherwise than by *entireties* (*q*),—it is enacted, that licences to aliene parcels may now be granted, and such alienation may be made accordingly (*r*).

Thirdly, with a view to facilitating *enfranchisement*, that is to say, the conversion of the copyhold into freehold, the Copyhold Act, 1894, re-enacting the like provisions contained in the earlier Copyhold Acts, provides, in substance (for no minute detail can be attempted in this place), that, with the consent of the commissioners (or now of the Board), it shall be lawful for the lord, whatever may be

(*m*) 57 & 58 Vict. c. 46, ss. 82, 83, 84, re-enacting 4 & 5 Vict. c. 35, ss. 86, 87, 88, 89.

(*n*) 1 Watk. Cop. 79, 80.

(*o*) 57 & 58 Vict. c. 46, s. 85, re-enacting 4 & 5 Vict. c. 35, s. 90.

(*p*) 57 & 58 Vict. c. 46, ss. 82, 83, re-enacting 4 & 5 Vict. c. 35, ss. 89, 90.

(*q*) 1 Watk. Cop. 287 n. (*x*).

(*r*) 57 & 58 Vict. c. 46, s. 86, re-enacting 4 & 5 Vict. c. 35, s. 92.

his interest, to enfranchise all or any of the lands holden of his manor ; and that it shall be lawful for the copyhold tenant (whatever his interest), with the like consent, to accept such enfranchisement,—enfranchisements so effected being called voluntary enfranchisements (*s*). And the Act further provides, that independently of any mutual agreement upon the subject, it shall be lawful for any copyhold tenant—other than one who holds only for life or lives or years, without right of renewal—or for any lord, to *require* and *compel* enfranchisement,—enfranchisements so effected being called compulsory enfranchisements (*t*) ; and in the case of these latter enfranchisements, the amount, nature and particulars of the compensation for the manorial rights is ascertained (unless the parties can agree) under the direction of the Copyhold Commissioners (or now of the Board) (*u*). And as regards the expenses of and attending the enfranchisement, the Act provides, that the expense of a compulsory enfranchisement shall be borne by that party (whether the lord or the tenant) who shall have required the same (*x*) ; which expenses may (in the case of limited owners) be charged (in the case of tenants) on the lands enfranchised, and (in the case of lords) on the manor (*y*) ; and further, that upon every enfranchisement (whether compulsory or voluntary) being effected, the land shall become in all respects of freehold tenure, and cease to be subject to any particular custom whatever (*z*) ; but that, on the other hand, no compulsory enfranchisement shall compulsorily affect any right as to mines or minerals, or any right of fair or market, or of game, fish, or fowl (*a*) ; or, since the 16th of September,

(*s*) 57 & 58 Vict. c. 46, ss. 14—20.

(*t*) *Ibid.* ss. 1—13.

(*u*) *Ibid.* ss. 5—7 ; *Lingwood* v. *Gyde*, Law Rep., 2 C. P. 72.

(*x*) 57 & 58 Vict. c. 46, s. 34.

(*y*) *Ibid.* ss. 36, 37.

(*z*) *Ibid.* s. 21 ; *Brabant* v. *Wilson*, Law Rep., 1 Q. B. 44 ; Scriven on Copyholds, 7th ed., by Brown, pp. 334—360 ; Brown's Copyhold Enfranchisement Acts.

(*a*) 57 & 58 Vict. c. 46, s. 23, re-enacting 15 & 16 Vict. c. 51, s. 48.

1887, the lord's right of escheat (*b*). And these provisions of the Copyhold Act, 1894, extend also to extinguishing, in the case of freehold lands held of the manor, the heriots or other like incidents of tenure annexed thereto (*c*).

(*b*) 57 & 58 Vict. c. 46, s. 21, re-enacting 50 & 51 Vict. c. 73, s. 4.

(*c*) 57 & 58 Vict. c. 46, ss. 2, 94.

CHAPTER XXIII.

OF INCORPOREAL HEREDITAMENTS, CALLED ALSO "PURELY INCORPOREAL" HEREDITAMENTS.

INCORPOREAL hereditaments now remain to be considered; and to distinguish them from remainders and reversions, they have sometimes been called *purely* incorporeal hereditaments. And an incorporeal hereditament is, first of all, not the object of the bodily senses,—whence it is called *incorporeal*; and secondly, it is a *hereditament*, that is to say, something descendible to heirs (as distinguished from executors or administrators); and it may be (but rarely is) personal property, *e.g.*, in the case of a personal annuity descendible to heirs (*d*); most usually,—and, in fact, in almost all cases,—it is real property, and may with some propriety be defined as a right annexed to, or issuing out of, or exerciseable within, a hereditament corporeal and real (*e*),—*e.g.*, a right of common of pasture for cattle, or a right of way, to be exercised over the land of another person, the former of these two rights being called a *profit à prendre*, and the latter of them an *easement* (*f*).

Incorporeal hereditaments include (amongst other species not requiring specific notice) *advowsons*, *tithes*, *commons*, *ways*, *watercourses*, *lights*, *offices*, *dignities*, *franchises*, *corodies*, *pensions*, *annuities*, and *rents* (*g*). But for the discussion of many of these subjects, places more distinctly appropriate will be found hereafter; and therefore, in the present chapter, we shall direct the reader's attention to

(*d*) Co. Litt. 20 a.

(*e*) *Ibid.* 6 a, 20 b; Plowd. 170.

(*f*) *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96.

(*g*) 2 Bl. Com. 21.

the following heads only, namely, *commons*, *ways*, *watercourses*, *lights*, *franchises*, and *rents* (including *annuities*), —*commons* being emphatically *profits à prendre*, while ways, watercourses, and the like, are *easements*, that is to say, privileges without profit, enjoyed *in alieno solo* (*h*).

[1. *Common* (or right of common) is a profit which a man hath in the land of another,—as to pasture beasts thereon, to catch fish, to dig turf, to cut wood, or the like (*i*) ; and the right derives its name from the community of interest which thence arises between the claimant and the owner of the soil, or between the claimant and other commoners entitled to the same right ; all which parties are entitled to bring actions for injuries done to their respective interests—and that both as against strangers and as against each other (*k*). There are five sorts of common—common of pasture, common of piscary, common of turbary, common of estovers, and common in the soil.

1. Common of pasture is the principal and most frequent sort, being the right which a man has to feed his beast on another's land ; and it is either *appendant*, *appurtenant*, *because of vicinage*, or *in gross* (*l*) ; and note, that things *appendant* (whether common of pasture or other incorporeal hereditament) are "ever by prescription ; "but *appurtenants* may be created, in some cases, at this "day" (*m*).

Common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor, to put upon the wastes of the manor (usually called *commons*) their commonable beasts ; that is, such beasts as are necessary either for the ploughing of the land or for its

(*h*) *Race* v. *Ward*, 4 Ell. & Bl. 702.

(*i*) 2 Bl. Com. p. 32 ; *Lloyd* v. *Earl Powis*, 4 Ell. & Bl. 485.

(*k*) *Robert Mary's Case*, 9 Rep. 113.

(*l*) Co. Litt. 122.

(*m*) *Ibid.* 121 b.

[manuring, viz., horses and oxen, cows and sheep (*n*) ; but swine, goats, geese, and the like are not commonable (*o*), although in respect of swine there may be a right of pannage (*p*). This species of common of pasture is a matter of universal right (*q*) ; and it originally arose in this manner, that where a lord having a certain extent of waste ground, enfeoffed any one of a parcel of arable land to hold of his manor in socage, for services to be rendered, it was found necessary to allow the feoffee to have common of pasture in the waste ground, as incident to his tenancy ; for he could not plough or manure his own land without beasts, nor could he sustain the beasts upon it, while it was sown with corn (*r*). From this of course it follows, that it is only in respect of *arable* land that common appendant can be claimed (*s*) ; though it may be claimed by that name, as appendant to a farm in fact containing pasture at the present day,—for the land shall be presumed (where there is usage to sustain the claim) to have been originally arable (*t*). It follows, also, that common appendant is incapable of being created at the present day (*u*) ; for all manorial tenure must have had existence before the passing of the statute of *Quia emptores*, in the eighteenth year of Edward the First.

Common *appurtenant*, frequently confounded with common *appendant* (*x*), ariseth from no connection of tenure, nor from any absolute necessity ; but may be annexed to lands in other lordships, and may extend to other beasts besides such as are generally commonable (*y*),—as to

(*n*) Year Book, 37 Hen. 7, 34 ; F. N. B. 180 ; 4 Vin. Ab. in tit. Com. (F.).

(*o*) Bro. Ab. tit. Com. 13 ; Fin. Law, 56 ; Co. Litt. 122 a.

(*p*) *Chilton* v. *Corporation of London*, 7 Ch. D. 562.

(*q*) 2 Bl. Com. 33 ; 1 Rol. Ab. 396, l. 44 ; Co. Lit., *ubi sup.*

(*r*) *Tyringham's Case*, 4 Rep. 37 a ; Co. Litt. 122 a ; Hist. Eng. Law, by Reeves, vol. i., p. 262.

(*s*) 1 Rol. Ab. 397, l. 28, 29.

(*t*) Bac. Ab. Common, (A. 1).

(*u*) 1 Rol. Ab. 396, l. 42 ; Year Book, 26 Hen. 8, 4 a.

(*x*) *Bennett* v. *Reeve*, Willes, 232.

(*y*) *Sacheverill* v. *Porter*, Cro. Car. 482 ; 1 W. Jones, 397, S. C.

[hogs, goats, geese, or the like. This, not arising from any natural propriety or necessity, like common appendant, is not therefore of general right, but can only be claimed by grant, or by the long usage of particular persons to enjoy the same (*z*),—which latter title is commonly called a title by prescription ; and is supposed to be founded on a special grant or agreement originally made for this purpose.

Common *because of vicinage* (or neighbourhood) is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another, the beasts of the one straying naturally into the adjoining wastes of the other, without any molestation from either. This, indeed, is only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits ; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common ; but if they escape from the one common and stray into the other and adjoining common of themselves, the law winks at the trespass (*a*). In close connection with this, and substantially of the same kind, is the right described in the books as *common of shack*—or the right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field (*b*). Indeed, this kind of common, which in the beginning was but in the nature of a pasture "because of vicinage," and founded on the same reason, has now long since in many parts of the country insensibly changed its nature,—and has become, by the force of custom, a right so fixed, that

(*z*) *Tyringham's Case*, 4 Rep. 36 b ; *Cowlan* v. *Slack*, 15 East, 108 ; *Morley* v. *Clifford*, 20 Ch. Div. 753.

(*a*) Co. Litt. 122 a ; *Commissioners of Sewers* v. *Glasse*, L. R. 19 Eq. 160.

(*b*) *Corbet's Case*, 7 Rep. 5 ; *Cheesman* v. *Hardham*, 1 Barn & Ald. 710.

[even though the owner of any particular parcel should assume, merely on his own authority, to inclose his land in severalty, it would still continue subject to the antient rights of the intercommoners (*c*) ; and the right may properly be classed under the head of *common appurtenant*. And originally these lands lying together in a common field were most probably in the nature of *common meadows* (otherwise called *lot-meads*), being lands which time out of mind have been divided between certain persons, a certain quantity or acreage to each in severalty, but the acreage being lotted to them yearly sometimes in one part of the common field and sometimes in another part of it, so that the allottees have (in fact) a moveable fee simple in the certain acreage of each (*d*).

Common *in gross* (or at large) is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed ; or it may be claimed by prescription (*e*) ; and it is a separate inheritance, entirely distinct from any other land that may be vested in the person to whom the right of common belongs, and apparently although he should not have any other land at all.

Common of pasture, of whatever kind, may, in respect of time, be either limited or unlimited,—that is, may either be confined to particular seasons of the year, or may last all the year round (*f*); but as regards the number of beasts to be turned on, the right is in general subject to restriction ; for all commons (except perhaps those in gross) must be either claimed in respect of some number in particular, or at least in such manner as tends to limit the number, as for all cattle *levant* and *couchant* on the land to which the common is appendant or appurtenant ; that is, for so many as the land is capable of maintaining during the winter ; and a claim subject to no limitation of either kind, (except

(*c*) *Corbet's Case*, 7 Rep. 5.
(*d*) Co. Litt. 4 a.
(*e*) 2 Bl. Com. 34; *Shuttleworth* v *Le Fleming*, 19 C. B. (N.S.) 687.
(*f*) Bl. Com., *ubi sup.*

[perhaps in the case where an express grant to that effect could be shown,) would be void (*g*) ; but with respect to common in gross, it may be either limited to a particular number ; or, *semble*, it may be absolutely unlimited, in which case it is sometimes called a common *without stint*, or *sans nombre* (*h*).

2, 3. Common of *piscary* is a liberty of fishing in another man's water—as common of *turbary* is a liberty of digging turf upon another man's ground (*i*) ; and with respect to common of turbary, in particular, it may be remarked that, like common of pasture, it may be either by grant or prescription ; and may be either appurtenant or in gross ; but it is usually claimed as appurtenant, and by prescription ; and as to a common of turbary of this kind, it cannot be claimed as appurtenant to land, but only to a house (*k*); and it authorizes not the taking of turf except for the purpose of using the same as fuel, in the particular house to which the right is annexed (*l*).

4. Common of *estovers* or *estouviers* (from *estoffer*, to furnish), is a liberty of taking *necessary* wood, for the use or furniture of a house or farm, from off another man's land ; and, like common of pasture, it may be claimed either by grant or prescription. And note, that this *common* of estovers is exerciseable *in alieno solo*, differing in this respect from the house-bote, &c. of a tenant for life, which are also called estovers, but which are taken *in suo solo*, *i.e.*, in the land itself of the tenant for life.

5. In addition to the above-mentioned rights of common, there is also common *in the soil*; which consists of the right of digging for coals, minerals, stones, and the like (*m*); and this last species, and common of turbary, bear a resemblance

(*g*) 1 Saund. by Wms. 28 b, n. (4) ; *Bennett* v. *Reere*, Willes, 231 ; *Corbet's Case*, 7 Rep. 5.

(*h*) Co. Litt. 122 a ; *How* v. *Strode*, 2 Wils. 274 ; 3 Bl. Com. 237, 239.

(*i*) Co. Litt. *ubi supra* ; *Wilson* v. *Willes*, 7 East, 121.

(*k*) *Tyringham's Case*, 4 Rep. 37 a.

(*l*) *Valentine* v. *Penny*, Noy, 145; *Peppin* v. *Shakespear*, 6 T. R. 748.

(*m*) Co. Litt. 41 b, 122 a.

[to common of *pasture* in many respects, though in one point they go much further:—common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; while common of turbary, and of digging for coals, and the like, is a right of carrying away the very soil itself.

By the statute of Merton (20 Hen. III. c. 4), the lord of a manor might inclose against common *of pasture* (*n*),—though not against common of estovers or of turbary (*o*),—so much of the waste as he pleased, for tillage or wood ground—provided he left common sufficient for such as were entitled thereto (*p*). This inclosure, when justifiable, is called in law "approving,"—an antient expression, signifying the same as "improving" (*q*); and this right is considered as applying equally to any owner of the waste, though he may not fall within the description of lord of the manor (*r*).] But no one may now approve even against common of pasture, without first giving three months' notice of his intention to do so, by advertisement in the local papers and otherwise (*s*), and without first obtaining the consent of the Board of Agriculture (*t*).

But the inclosure of common fields and waste lands, and the consequent extinction of common rights therein, are objects of so much importance to agricultural improvement, that they were not left in modern times to depend on this antient statute; but were introduced very generally, throughout entire manors and parishes in almost every part of the kingdom, by force of local Acts of Parliament, passed from time to time for the purpose; and in aid of this practice was passed the statute 41 Geo. III. c. 109, (since repealed) to consolidate a number of regulations, and to make them applicable (subject only to any special

(*n*) See also 13 Edw. 1, c. 46.
(*o*) 2 Inst. 87; *Bateson* v. *Green*, 5 T. R. 416; *Arlett* v. *Ellis*, 7 Barn. & Cress. 369.
(*p*) *Arlett* v. *Ellis*, *ubi sup.*
(*q*) 2 Inst. 474.
(*r*) *Glover* v. *Lane*, 3 T. R. 445.
(*s*) 39 & 40 Vict. c. 56, s. 31.
(*t*) 56 & 57 Vict. c. 57.

provisions in the local Acts) to every case of local inclosure (*u*). And improvements of this description are now effected under the provisions of "The Inclosure Acts," of which the chief is the 8 & 9 Vict. c. 118, commonly called "The General Inclosure Act, 1845" (*x*). By this Act, after reciting that "it is expedient to facilitate the "inclosure and improvement of commons," &c.,—an elaborate system of regulations is laid down with reference to inclosures; and under these regulations, *exchanges* and *partitions* of lands may also be effected, even where no inclosure is proceeding (*y*). And the short effect of the provisions relative to inclosure are as follows:—The Acts establish a board of commissioners under the denomination of "The Inclosure Commissioners for England and Wales," and who now constitute the Inclosure Department of the Board of Agriculture (*z*); and these commissioners are empowered—on the application of persons interested to the amount of one-third of the value of the lands subject to be inclosed (*a*), and provided the consent of persons interested

(*u*) *Doe* v. *Spencer*, 2 Exch. 692.

(*x*) See also 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43; 31 & 32 Vict. c. 89; 39 & 40 Vict. c. 56; 41 & 42 Vict. c. 56; 42 & 43 Vict. c. 37; and 45 & 46 Vict. c. 15.

(*y*) *Minet* v. *Leman*, 24 L. J. Ch. 545.

(*z*) 52 & 53 Vict. c. 30.

(*a*) The lands *subject to be inclosed* are (s. 11) as follows:—"All lands subject to any right of common whatever, and whether such rights may be exercised at all times, or only at limited times and seasons or subject to any suspensions or restrictions in respect of the time of enjoyment; all gated and stinted pastures in which the property of the soil either is or is not in the owners of the cattle or other gates or stints; all land held, occupied, or used in common either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds, or be otherwise distinguishable; all land in which the property or right to the vesture or herbage, or any part thereof, during the whole or any part of the year, or to the wood or underwood growing thereon, is

to the amount of two-thirds of the value of the land, and of the lord of the manor (in case the lands be waste of a manor), be ultimately obtained,—to inquire into the case, and to report for the information of Parliament with regard to the expediency of making such inclosure; and if thereon an Act be passed to the effect that such inclosure be proceeded with, the allotment and inclosure of the lands take place accordingly,—the proceedings being conducted by the aid of a *valuer* appointed for the purpose, and who values under the superintendence of the commissioners. And the Act of 1845, by sect. 146, declares, that immediately after such allotment and inclosure of the lands shall have been made, or from such other time as shall be fixed after proper notice, the common or other rights, which it is the object of the inclosure to commute, shall be *extinguished* accordingly; and it directs that copies of the award (which is to be under the seal of the commissioners) shall be deposited with the clerk of the peace for the county, and also with the churchwardens of the parish, so that recourse thereto may be freely had by any person interested in the premises.

Also, by the 39 & 40 Vict. c. 56, common lands, in lieu of being inclosed, may be appropriated as open land, and *regulated* for the public use; and it is expressly provided by that Act, that any encroachment on, or inclosure of, a village green or recreation ground, having a known and defined boundary, shall be a public nuisance, and summarily punishable before the magistrates; and a civil jurisdiction is also thereby given to the county court of the district in the matter of any such nuisance, and that court may accordingly (and as the justice of the case requires) grant injunctions or make orders of removal or abatement.

separated from the property of the soil; and all lot meadows and other lands, the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise."

II. *Ways* are the second species of incorporeal hereditaments which we propose to consider ; and by ways, we do not here mean *highways*, which are common to the public ; but *private* ways, in which one man may have an interest and a right, though another be owner of the soil of the ways. Such ways may be grounded on express grant,—as when the owner of land grants, by deed, to another man the liberty of passing over his (the grantor's) land, to go to church, to market, or the like (*b*) ; or they may be by prescription, *i.e.*, by implied grant,—as if all the owners and occupiers of such a farm have long used to cross such a ground for such a particular purpose : or they may be by custom or antient usage,—as if a similar practice has obtained with respect to all the inhabitants of a certain hamlet (*c*), this antient usage suggesting an original grant, whereby a right of way was antiently created. And upon whichever of these three titles the right may stand, it is capable, like that of common, of being either *appurtenant* or *in gross* ; but the existence of easements *in gross* has latterly been denied ; and the correct view regarding easements so called *in gross* appears now to be either to regard them as mere licences, or else to find for them some possible legal origin, as having been originally appendant or appurtenant to some corporeal hereditament (*d*). A right of way may also arise of necessity ; as if A. grants to B. a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives him a way to come to it (*e*),—for that is *necessary* to its enjoyment (*f*) ; and he may cross his land for that purpose by some defined way without any trespass ; and if the particular way is out of repair, he may go over any other part of the land (*g*).

(*b*) *Wood* v. *Leadbitter*, 13 Mee. & W. 838.

(*c*) 2 Bl. Com. 35.

(*d*) *Rangeley* v. *Midland Rail. Co.*, L. R., 3 Ch. App. 306.

(*e*) *Clarke* v. *Cogge*, Cro. Jac. 170 ; *Hinchliffe* v. *Lord Kinnoul*, 5 Bing. N. C. 24, 25 ; *Skull* v. *Glenister*, 16 C. B. (N.S.) 81.

(*f*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321, n. 6.

(*g*) 2 Bl. Com. 36 ; *Taylor* v. *Whitehead*, Doug. 745.

In like manner, a tenant at will shall, after the determination of his interest by the lessor, have free entry, egress, and regress into the land, in order to cut and carry away his emblements,—for when the law gives a right, it gives everything necessary to the exercise of the right (*h*).

III. *Watercourses* are the third species of incorporeal hereditaments,—a watercourse being the right which a man has to the benefit of the flow of certain water ; and such right most commonly refers to a river or stream, the banks of which belong either to the claimant on both sides, or to him on one side, and to his neighbour on the other (*i*): in which latter case, it may be remarked that,—unless indeed the river be navigable, for then the bed of it, so far at least as the tide of the sea flows, *primâ facie* belongs to the crown (*k*),—the proprietor of each bank is considered as *primâ facie* the proprietor also of half the land covered by the water ; that is, *usque ad medium filum aquæ* (*l*). But a watercourse is distinguishable from the right of merely using the water flowing over the soil, which is incident as of course to the property in the soil itself ; for the right to a watercourse involves the right to have the course of the water kept free from any interruption or disturbance to the prejudice of the claimant of the right, by the acts of persons from without and in parts not within his own territory,—whether owing to a diversion of the water, or to any obstruction of its flow, or to its pollution by any offensive commixture. This right belongs *primâ facie* to every occupier of land over which a stream passes (*m*) ; for though running water, air, and light are all *publici juris*, yet to a certain extent they are subject to

(*h*) Co. Litt. 55 a, 56 a.

(*i*) *Wood* v. *Waud*, 3 Exch. 748.

(*k*) *Williams* v. *Wilcox*, 8 Ad. & El. 333.

(*l*) Hale, De Jure Maris, part i. ch. 1 ; *Wright* v. *Howard*, 1 Sim. & Stu. 190.

(*m*) *Sury* v. *Piggott*, 3 Bulst. 340 ; *Embrey* v. *Owen*, 6 Exch. 369.

appropriation by force of an actual occupancy (*n*); and he who is in possession of any soil, is *primâ facie* in possession also of the free course of the streams which flow over its surface; but streams underground (including wells and springs) are ordinarily of too uncertain a character to admit of this appropriation (*o*). Moreover, the natural right, where it exists, may be divested by express agreement between the parties interested,—or by long usage, which is evidence of some antient agreement of that description; and therefore my general claim to have the water of such a stream flowing freely and without disturbance over my land, may be successfully opposed by my neighbour, if he can prove that (by some grant of mine or of my ancestors) he is authorized to keep up a mill or the like, and thereby to cause an obstruction in the flow of the stream—or if he can establish a title by long usage to do so; for he has then by grant or by prescription a watercourse for such special purpose, to which the general right I might otherwise have had by occupancy has become subordinate (*p*).

IV. *Lights*, otherwise called *antient lights*, are a fourth species of incorporeal hereditaments, the term being used to express a man's right to have the access of the sun's rays to his windows, free from any obstruction by the occupier of adjoining land (*q*); and this is so (at least since 1833 it has been so) even within the city of London (*r*),

(*n*) *Taylor* v. *St. Helens Corporation*, 6 Ch. Div. 264.

(*o*) *Wood* v. *Waud*, 3 Exch. 748; *Race* v. *Ward*, 4 Ell. & Bl. 702; *Chasemore* v. *Richards*, 2 H. & N. 168; *Acton* v. *Blundell*, 12 Mee. & W. 324; *Ballard* v. *Tomlinson*, 29 Ch. D. 115.

(*p*) *Sampson* v. *Hoddinott*, 1 C. B. (N.S.) 590; *Ormerod* v. *Todmorden*, 11 Q. B. D. 155; and (as to artifical watercourses) *Arkwright* v. *Gell*, 5 Mee. & W. 203; and *Magor* v. *Chadwick*, 11 Ad. & Ell. 571.

(*q*) *Aldred's Case*, 9 Rep. 58 b; *Jones* v. *Tapling*, 12 C. B. (N.S.) 826; *Clarke* v. *Clark*, Law Rep., 1 Ch. App. 16; *Yates* v. *Jack*, *ib.* 295; *Russell* v. *Watts*, 25 Ch. Div. 559; 10 App. Ca. 590.

(*r*) *Yates* v. *Jack*, *ubi sup.*, referring to 2 & 3 Will. 4, c. 71, s. 3.

and in other large towns. For the element of light, like that of water, is capable, to a certain extent, of appropriation by mere occupancy—a man on his own land having a right to all the light which will come to him; and he may erect a house (even on the boundary line of his property, and so as to overlook his neighbour) with as many windows as he pleases; and by force of some grant, or by prescription, he may be or become entitled to maintain these windows in freedom from all obstruction (*s*),—although in the absence of any grant, and before any prescriptive right has arisen, it is competent to the owner of the adjoining land, by a wall or otherwise, to intercept or to obstruct the light, and so to prevent the easement from arising (*t*).

V. [*Franchises*, otherwise called *liberties*, are a fifth species of incorporeal hereditaments, a franchise being a royal privilege, or branch of the crown's prerogative, subsisting in the hands of a subject (*u*). Franchises, therefore, being derived from the crown, must either arise from royal grant, or be held by prescription, which presupposes such a grant (*x*); and they may be vested either in natural persons or in bodies politic; in one man or in many; but the same identical franchise that has before been granted to one, cannot be bestowed on another,—for the latter grant would prejudice the former grant (*y*).

To be a county palatine is a franchise vested in a number of persons; and to have a bailiwick or liberty exempt from the sheriff of the county, and wherein the grantee only and his officers are to execute process, is a franchise; and there are also many franchises exerciseable by lords of manors,

(*s*) *Blanchard* v. *Bridges*, 4 Ad. & El. 195; *Beddington* v. *Atlee*, 35 Ch. D. 317.

(*t*) *Blanchard* v. *Bridges*, *ubi sup.*; *Bonner* v. *Great Western Rail. Co.*, 24 Ch. D. 1.

(*u*) Finch, L. 164.

(*x*) Co. Litt. 114 a; *Goodman* v. *Mayor of Saltash*, 7 App. Ca. 633.

(*y*) 2 Roll. Ab. 191; Keilw. 196.

[as annexed to their *manors*,—as to hold a court leet; or to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures,—the nature of all which franchises will more particularly appear when we come to speak of the crown's prerogatives (*z*). So also, there may be a franchise to have a fair, market, ferry, or the like,—with the right of taking toll there; or to have forest, chase, park, warren, or fishery; and *deodands* also were a species of franchise, but they have now been abolished (*a*). Among franchises, there are many which belong, in point of arrangement, to other parts of the present treatise; but to others more particular notice is due in this place.

1. And, first, as to fairs, markets, and ferries. A man may have a right to hold a fair or market, or to keep a boat for the ferrying of passengers,—and this either by Act of Parliament, by royal grant, or by prescription (*b*); but no other title than these will suffice,—for no fair, market, or ferry can be lawfully set up without licence from the crown (*c*). And a man may, under such titles, lawfully claim to be lord of a fair or market, though he be not the owner of the soil of the place whereon it is held (*d*); or to be the proprietor of a ferry (*e*), though he be not the owner either of the water over which it is exercised (*f*), or of the land on either side of the river (*g*), but, in such cases, he must possess over the soil such rights, at least, as will authorize him to embark and disembark his passengers thereon (*h*). The right to take toll, also, from the customers, is usually—though in the case of a fair or market not

(*z*) *Vide post*, bk. IV. pt. I. ch. VI.

(*a*) *Vide post*, bk. IV. pt. I. ch. VII.

(*b*) 2 Inst. 220; *Trotter* v. *Harris*, 2 Y. & J. 285,

(*c*) 2 Inst, 220; R. v. *Marsden*, 3 Burr. 1812; Willes, 512, (n.); Com. Dig. Piscary, B.; Hale, *de Jure Maris*, part i. ch. 2.

(*d*) Bac. Ab. Fairs, &c. D. n. (*a*); *Mayor of Northampton* v. *Ward*, 2 Stra. 1238; 1 Wils. 107; *R.* v. *Starkey*, 7 Ad. & E. 106.

(*e*) *Newton* v. *Cubitt*, 12 C. B. (N.S.) 32; *Letton* v. *Goodden*, Law Rep., 2 Eq. Ca. 123.

(*f*) Com. Dig. in tit. Piscary, B.

(*g*) *Peter* v. *Kendal*, 6 B. & C. 703.

(*h*) *Ibid.*

[necessarily—a part of the privilege (*i*) ; and the tolls of a fair or market are due either in respect of goods sold there, or for stallage, pickage, or the like, in respect of stalls or poles fixed in the soil (*k*) ; but the right of the crown to authorize the collection of tolls is viewed by the law with a salutary jealousy,—so that no burthen of that kind can be imposed on the public, unless it have had a reasonable commencement (*l*) ; that is to say, unless it be founded on an adequate consideration, as between the public and the grantee,—which consideration, in the case of a fair or market, is the duty incumbent on the grantee to provide ground for the purpose, and to regulate the proceedings ; in that of a ferry, to keep up a boat for passage over a stream not otherwise fordable (*m*) ; and it is also essential that the burthen be reasonable in its amount (*n*),—for where the tolls granted are outrageous, the franchise is illegal and void (*o*). It is, however, to be remarked, that, when any one of the privileges in question can be shown to exist, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll where it is due, but also against those who disturb his franchise by setting up a new fair, market, or ferry, so near to his as to diminish his custom (*p*) ; while on the other hand he is himself liable to be criminally indicted, if by his wilful act, or even by his neglect of duty, the subjects of the realm are obstructed in their lawful use of the franchise (*q*).] And we may also observe, that the legislature has, more especially of recent years, enacted

(*i*) *Heddy* v. *Wheelhouse*, Cro. Eliz. 558, 592; *Lord Egremont* v. *Saul*, 6 Ad. & El. 924; *R.* v. *Starkey*, 7 Ad. & El. 106.

(*k*) 2 Inst. 219.

(*l*) 2 Bl. Com. 37; *Mayor of Nottingham* v. *Lambert*, Willes, 116.

(*m*) *Heddy* v. *Wheelhouse*, Cro. Eliz. 558, 592.

(*n*) 2 Inst. 219.

(*o*) Stat. Westm. 1 (3 Edw. 1), c. 31; 2 Inst. 219; Cro. Eliz. *ubi sup.*; 2 Bl. Com. 37; Willes, 116.

(*p*) 2 Roll. Ab. 140; Com. Dig. Action on the Case for a Nuisance, (A.); *Abergavenny* (*Commissioners*) v. *Straker*, 42 Ch. D. 83.

(*q*) Willes, 512, (n.); *Payne* v. *Partridge*, 1 Show. 231.

divers provisions for the establishment and subsequent regulation of fairs and markets, and which provisions are either of a general applicability to all fairs and markets (*r*), or relate exclusively to some particular market, *e.g.*, the Greenwich market (*s*) or the market at Smithfield (*t*); and some of them prescribe the days for holding the market (*u*); and others of them provide for the abolition of certain fairs (*x*), and for the suppression of fairs that are deemed unlawful (*y*).

[2. Secondly, as to the franchises of forest, chase, park, warren, and fishery,—a *forest* is the right of keeping, for the purpose of venary and hunting, wild beasts and fowls of forest, chase, park, and warren, in a certain territory or precinct of woody ground or pasture set apart for the purpose (*z*). By our law, no man can make title to animals *ferœ naturæ*, being and remaining wild; and though a man may take or kill on his own lands animals *ferœ naturæ*,—so that he invade not any exclusive franchise of sporting, which another person may possess over the same lands,—yet he is not at liberty to confine beasts of venary in a wild state within a particular precinct, for the mere purpose of diversion (even though on his own soil),—for this is in the nature of an unlawful monopoly (*a*); and this is so, notwithstanding that some kinds of animals *ferœ naturæ*, such as deer, rabbits, and the like, may be lawfully kept by any person in an enclosed place, if preserved as *property*, and not merely for the purpose of the chase (*b*). But the right to keep up animals in a wild state for mere diversion, though forbidden to the subject,

(*r*) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*s*) 12 & 13 Vict. c. 25.

(*t*) 14 & 15 Vict. c. 61.

(*u*) 36 & 37 Vict. c. 37; and see also 27 Hen. 6, c. 5.

(*x*) 34 & 35 Vict. c. 12.

(*y*) 31 & 32 Vict. c. 106.

(*z*) Co. Litt. 233 a; Manwood, Forest Laws, 41, 52, edit. 1665.

(*a*) *Case of Monopolies*, 11 Rep. 87 b; 2 Inst. 199; Com. Dig. Chase (D).

(*b*) *Davies* v. *Powell*, Willes, 48; *Morgan* v. *Abergavenny*, 8 C. B. 768.

[has been at all times admitted as a matter of prerogative in the sovereign ; for we find, that even among the Saxons there were woody and desert tracts called forests, which were filled with great game, reserved by the sovereign for his own pleasure and protected by heavy pecuniary penalties ; and upon the Conquest, the Norman sovereigns exceeded even their predecessors in their enjoyment of this prerogative ; for not only did they extend the limits of the antient forests, by encroachment on the lands of their subjects (*c*), but they established a particular system of *forest law* (*d*), which was apparently of a most tyrannical and oppressive character (*e*),—so that our ancestors were as zealous for the reformation of the forest laws as for the relaxation of the other feudal rigours, and struggled for the *Charta de Forestâ*, as strenuously as for the Great Charter itself (*f*). By the *Charta de Forestâ*, which was confirmed in parliament in the ninth year of Henry the Third, many forests unlawfully made (or at least many precincts added by unlawful encroachment to the antient forests) were *disafforested* (*g*),—though in the case of such precincts, called thenceforward *purlieus*, the crown still continued to exercise certain of its privileges (*h*) ; and in the forests that remained entire, many abuses were reformed and the severity of punishments were mitigated ; and by reason of the variety of statutes afterwards made for the amelioration of the forest laws, this branch of the prerogative has long ceased to be a grievance to the subject (*i*). Many of the royal forests however still exist ; and of them some are of a known origin,—such as the

(*c*) Manw. 319; 4 Inst. 300, 301.

(*d*) 1 Hist. Eng. Law, by Reeves, 206.

(*e*) "The penalty for killing a "stag or boar was loss of eyes—for "William loved the great game," says the Saxon Chronicle, "as if "he had been their father."—Hallam's Mid. Ages, vol. ii. p. 426, 7th edit.

(*f*) 2 Bl. Com. 416.

(*g*) Hist. of Eng. Law, by Reeves, vol. i. p. 254 ; 4 Inst. 300.

(*h*) 4 Inst. 303, 304 ; Com. Dig. Chase, 1.

(*i*) 2 Bl. Com. 416.

[New Forest in Hampshire, founded by the Conqueror (*k*), that of Windsor by Henry the Eighth, and that of Richmond by Charles the First (*l*) ; while others of them are of such remote antiquity, that no trace is said to remain in history of their first creation ; and of these latter we may instance the forest of Epping (*m*), the forest of Hainault (*n*), the forest of Whichwood (*o*), the forest of Whittlewood (*p*), the forest of Woolmer (*q*), the forest of Delamere (*r*), and the forest of Dean (*s*) ; and it is said that, in England alone, there are altogether sixty-nine royal forests (*t*).

A forest, although a royal possession, is capable of being vested in a subject (*u*) ; for if the sovereign grants a forest to a private person, with words expressly authorizing the administration of forest law there, the grantee will have the franchise of a *forest* to its full extent, with all the appropriate courts and officers (*x*) ; and a forest is a right which the owner thereof (whether sovereign or subject) may have either in his own lands or in the lands of another (*y*). And in this respect, it differs from a right of common, and the other incorporeal hereditaments above described ; for these rights of common, as they issue out of the soil, cannot exist in the same man who is owner of the soil itself, (the latter title superseding all inferior claims like these,) and are consequently rights which a man can

(*k*) 14 & 15 Vict. c. 76 ; 16 & 17 Vict. c. 19 ; and 17 & 18 Vict. c. 49.

(*l*) Hallam's Const. Hist. vol. ii. p. 14, n., 3rd ed.

(*m*) 34 & 35 Vict. c. 93 ; 35 & 36 Vict. c. 95 ; 36 & 37 Vict. c. 5 ; and 38 & 39 Vict. c. 6.

(*m*) 14 & 15 Vict. c. 43 ; 21 & 22 Vict. c. 37 ; and 29 & 30 Vict. c. 62.

(*o*) 16 & 17 Vict. c. 36 ; and 19 & 20 Vict. c. 32.

(*p*) 16 & 17 Vict. c. 42 ; and 28 & 29 Vict. c. 16.

(*q*) 18 & 19 Vict. c. 46.

(*r*) 19 & 20 Vict. c. 13.

(*s*) 24 & 25 Vict. c. 40 ; 29 & 30 Vict. c. 70 ; and 34 & 35 Vict. c. 85.

(*t*) 4 Inst. 293, 294, 319.

(*u*) Co. Litt. 233 a.

(*x*) *Case of Leicester Forest*, Cro. Jac. 155.

(*y*) 4 Inst, 301, 318 ; *Lord Dacre* v. *Tebb*, 2 Bl. Rep. 1151 ; *Sutton* v. *Moody*, Ld. Raym. 251 ; *Robinson* v. *Duleep Singh*, 11 Ch. Div. 798.

[claim to exercise only *in alieno solo* (*z*) ; but a forest, and indeed all franchises in general, are inheritances collateral to the ownership of the land (*a*), and may be claimed by a man either *in proprio solo* or *in alieno solo* (*b*). The owner of a forest is also considered (notwithstanding the general rule that title cannot be made to things *ferœ naturæ*) as having a qualified property in the wild animals of chase and venary there found, so long as they continue there ; and no other person can lawfully take them within those precincts, or chase them from thence and take them in other ground (*c*) ; but if a wild animal strays from the forest, it ceases to be the property of the owner of the franchise, and will belong to the first taker (*d*).

A *chase* is a franchise granted by the crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so called, the wild animals of chase, which in a legal sense are the same with those to which the right of forest extends (*e*) ; but the franchise does not authorize the establishment of forest law within such precinct (*f*).

A *park* properly signifies an inclosure, and is popularly applied to any ground which a gentleman chooses to surround with a wall or paling, and to stock with a herd of deer ; but in the technical sense in which we now use the term, a park is nearly equivalent to a chase, being in effect no other than a chase *inclosed* (*g*).

A *free-warren* is a similar franchise (*h*), granted by the crown to a subject, for preservation or custody of beasts and fowls *of warren* ; which, according to Lord Coke, are "hare, coney, roe," "partridge, quail, rail, &c.," "pheasant,

(*z*) *Lloyd* v. *Powis*, 4 El. & Bl. 485.

(*a*) 4 Inst. 318.

(*b*) 2 Bl. Com. 38.

(*c*) *Sutton* v. *Moody*, Ld. Raym. 251.

(*d*) 12 Hen. 8, f. 10 ; Keilw. 30.

(*e*) Co. Litt. 233 a.

(*f*) Manw. 52 ; 2 Bl. Com. 415.

(*g*) Manw. 52 ; 2 Bl. Com. 38.

(*h*) See Bro. Ab. tit. Warren ; Co. Litt. 2 a, 114 b ; *Vere* v. *Lord Cawdor*, 11 East, 568 ; *Merest* v. *Harvey*, 5 Taunt. 442 ; *Pannell* v. *Mill*, 3 C. B. 625.

[woodcock, &c.," "mallard, heron, &c.," (*i*) ; but "grouse" are not fowls of warren (*k*). To this, as well as to chase and park, apply generally the principles which have been before noticed in respect of a forest ; with this exception, however, as to a park, that it is incapable of being claimed *in alieno solo*, and can exist only in land belonging to the owner of the franchise himself ; although something analogous to the right of *park* may possibly be reserved by the owner on the sale of his land.

A *free fishery* (*l*), or the exclusive right of fishing in a public river, is also a royal franchise (*m*). In private rivers (viz., in those not navigable), as the bed or soil, so the right of fishing, presumably belongs to the owners of the land on either side, and to them only (*n*) ; but in those which are public,—that is, navigable,—while the bed (so far at least as the tide flows) appertains to the crown, the right of fishing belongs *primâ facie* to the public at large (*o*) ; but either in public or in private rivers, there may be a particular title in some individual, by which the presumptive public right may be excluded ; and this may take place, in a public river, by force of some royal grant or of some prescription entitling a private person and his heirs to the exclusive right of fishing therein (*p*),—a privilege which is called in the books a "free fishery" (*q*), and sometimes a "several fishery" (*r*). Grants of this description can no longer be made by the crown (*s*) ;

(*i*) Co. Litt. 233 a ; Manw. 95 ; *Barrington's Case*, 8 Rep. 138 b.

(*k*) *Duke of Devonshire* v. *Lodge*, 7 B. & C. 36.

(*l*) Hale, de Jure Maris, part i. ch. 4 ; *Case of River Banne*, Davies, 55 ; *The Three Fishers of Whitstable* v. *Gann*, 13 C. B. (N.S.) 853.

(*m*) Seld. Mar. Claus. i. 24 ; Craig, de Jure Feod. II. 8, 15.

(*n*) Hale, de Jure Maris, part i. ch. 4.

(*o*) Hale, *ubi sup.* cc. 1, 2, 4.

(*p*) *Mayor, &c. of Orford* v. *Richardson*, 4 T. R. 437 ; *Leconfield* v. *Lonsdale*, Law Rep. 5 C. P. 657.

(*q*) *Neill* v. *Duke of Devonshire*, 8 App. Ca. 135.

(*r*) *Holford* v. *Bailey*, 8 Q. B. 1000 ; *Bristow* v. *Cormican*, 3 App. Ca. 641.

(*s*) *Duke of Somerset* v. *Fogwell*, 5 B. & Cress. 875.

[being prohibited by King John's great charter (*t*), and the second and third confirmations of it in the reign of his successor, whereby also the right of making *weirs* in our public rivers was restrained (*u*) ; but the right of making such grants, prior to its prohibition, was considered as one of the flowers of the prerogative ; and it is from this origin that the validity of a free fishery at the present day must in every case be derived ; but if a free fishery should have fallen to the crown by forfeiture, it may, *semble*, be re-granted (*x*). Free fishery, it need hardly be observed, is a franchise, and is wholly different from the right of *common of piscary* formerly mentioned, the latter not being a franchise at all, but a right created by the grant of a subject ; also, in a free fishery, a man has a qualified property in the fish before they are caught ; while in a common of piscary, he has no property at all till capture (*y*).

VI. *Rents* (including *annuities*) are the last species of incorporeal hereditaments that we propose to notice in this place. The word rent (*reditus*) signifies a compensation or return, of a certain amount, yielded periodically out of the profits of some corporeal hereditament, by the tenant thereof. Firstly, it is *yielded*, that is, paid as a thing due,—and therefore it is said, by the antient lawyers, to *lie in render*, in contradistinction to those incorporeal hereditaments, (as common or the like,) which the party entitled thereto is to take for himself, and which are, consequently, said to *lie in prendre* (*z*). Secondly, it is of certain amount, or that which may be reduced to certainty, by either party,—for *certum est, quod certum reddi potest* (*a*). Thirdly, it is payable periodically,—as yearly, or in every second, third, or fourth year, or the like (*b*).

(*t*) Cap. 47, edit. Oxon.

(*u*) *Williams* v. *Wilcox*, 8 Ad. & E. 314.

(*x*) *Mayor of Colchester* v. *Brooke*, 7 Q. B. 385.

(*y*) F. N. B. 88.

(*z*) Burton, Compend. 375.

(*a*) Co. Litt. 142 a.

(*b*) Co. Litt. 47 a.

[Again, it is considered as payable out of the profits of the land, and must consequently not be part of the land itself (*c*),—wherein it differs from an exception in a grant, which is always part of the thing granted (*d*) ; and there cannot be reserved, by way of rent, the vesture or herbage of the land demised (*e*) ; though there is no occasion for rent to be, (as it usually is,) a sum of money ; for spurs, capons, horses, corn and other matters may be rendered by way of rent (*f*). Moreover, rent must, as the general rule, issue out of hereditaments *corporeal* ; therefore a rent cannot be reserved out of a common, a franchise, or the like (*g*) ; or generally out of any incorporeal hereditament (*h*),—although a payment in the nature of rent may be so reserved, *e.g.*, a rent for a right of way (*i*). And, lastly, the person from whom it is due must be the tenant of the land ; but his tenancy may be either in possession, remainder, or reversion,—for a rent may be as well reserved upon the grant of a reversion or remainder, as on the conveyance of an estate in possession (*k*).

There were known to the common law three manner of rents, viz., rent-service, rent-charge, and rent-seck (*l*). *Rent-service* is where the rent accrues in connection with a tenure, attended (as tenure almost invariably is) by fealty, or by fealty and other services (*m*) ; and this, whether the party to whom the rent is due be entitled to fealty as having the reversion of the land out of which the rent issues, or as having the mere seigniory. Thus if A., seised in fee, made a gift of land to B. in tail,—or demise to him for life, or years,—reserving a rent ; or if B. be

(*c*) Co. Litt. 141 b, 142.
(*d*) 8 Rep. 71 ; Co. Litt. 142 a.
(*e*) Co. Litt. *ubi sup.*
(*f*) *Doe* v. *Benham*, 7 Q. B. 982.
(*g*) Co. Litt. *ubi sup.* 144 a, 47 a ; Gilb. Rents, 20.
(*h*) *Musket* v. *Hill*, 5 Bing. N. C. 694 ; *Martyn* v. *Williams*, 1 H. & N. 817.
(*i*) *Norral* v. *Pascoe*, 34 L. J. Ch. 82 ; *Earl of Portmore* v. *Bunn*, 1 B. & C. 694 ; *Lord Hastings* v. *North Eastern Rail. Co.*, [1898] 2 Ch. 674.
(*k*) Co. Litt. 47 a, 142 a ; Bac. Ab. Rent B.
(*l*) Litt. s. 213.
(*m*) *Ibid.*; Co. Litt. 122 a.

[seised in fee of a tenement holden of A. as lord of a certain manor, at a certain antient rent,—such rent is, in either case, rent-service,—for it is due as from a tenant owing fealty to his lord. To rent of this description, the common law attached as of common right,—and independently of any express provision for that purpose between the parties (*n*),—the power of *distress* which was incident to the fealty due by the tenant to his landlord (*o*) ; that is, the lord was entitled, in the event of the rent falling into arrear, to enforce payment without legal process, by entering upon the land, and seizing the goods and chattels found thereon ; and this common law right of distress attached also to the rent payable by a tenant at will, although by reason of there being no fealty in such a case, such rent was not properly a rent-service (*p*).

A *rent-charge* is where the owner of the rent has neither seigniory nor reversion, and can consequently claim no fealty ; yet is entitled to distrain by force of an express contract ; as where a man by deed conveys to another his *whole* estate in fee simple, with a certain rent payable to him thereout, and adds to the deed a covenant or clause of distress ; viz.—that, if the rent be in arrear, it shall be lawful to distrain for the same (*q*) ; or where a man by deed grants out of the land whereof he is seised, a certain rent payable to another, with a like clause of distress (*r*) ; in either of which cases, the land is liable to the distress, not of common right, but by virtue of the clause in the deed ; and therefore it is called a rent-charge, because in this manner the land is *charged* with a distress for the payment of it (*s*).] Rent-charges are commonly created by wills and marriage settlements ; and when created otherwise, they required (under 18 & 19 Vict. c. 15, ss. 12—14) to be in general registered in the Common Pleas ; and now (under the 42 & 43 Vict. c. 78) they are

(*n*) Litt. s. 214.
(*o*) Gilb. on Rents, pp. 3, 5.
(*p*) Co. Litt. 57 b.
(*q*) 2 Bl. Com. 42 ; Litt. s. 217.
(*r*) Litt. s. 218.
(*s*) *Ibid.* s. 217.

to be registered in the Central Office of the Supreme Court,—but if they are in the nature of a land-charge (*e.g.*, a terminable improvement charge) then (under the 51 & 52 Vict. c. 51) they are to be registered in the office of Land Registry. Also, rent-charges, in whatever way created, were in law regarded as being entire and indivisible ; so that to have released the rent-charge in part,—or to have released in part the lands charged therewith, —was to release the whole rent and the whole of the lands charged ; but the law is now altered in both these particulars (*t*).

[A *rent-seck* (*reditus siccus*) is where the owner of the rent has neither seigniory nor reversion, nor any such express power of distress as the owner of a rent-charge has ; and in any of the cases of rent-charge we have just mentioned, if no clause of distress were inserted in the deed, the rent would be rent-seck (*u*).

An *annuity* (unless where it is expressly charged on real estate) is a yearly sum chargeable upon the *person* or upon the personal estate of the grantor) (*v*) ; and if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it, but it is a mere personal annuity (*x*) and does not belong to the class of things real,—though, (by an anomaly which has sometimes led to confusion,) a man may have an estate of inheritance in it ; that is, it may be made descendible to his heirs, while personalty in general can devolve only upon the executors or administrators (*y*).

There are also other species of rents mentioned in the books ; but they are all reducible to one or other of the

(*t*) 22 & 23 Vict. c. 35, s. 10 ; *Booth* v. *Smith*, 14 Q. B. D. 318 ; *Baynton* v. *Morgan*, 22 Q. B. D. 74.

(*u*) Litt. ss. 217, 218.

(*v*) Co. Litt. 144, 20 a, and n. (4), by Harg. ; *Sollory* v. *Leaver*, Law Rep., 9 Eq. Ca. 22.

(*x*) 2 Bl. Com. 40 ; Co. Litt. 147 a.

(*y*) Co. Litt. 2 a, 20 a ; *Aubin* v. *Daly*, 4 . & Ald. 59.

[three above enumerated. *Rents of assize* are the rents at which the freeholders or copyholders of a manor have held under the lord from time immemorial (*z*) ; and these ancient rents cannot be departed from or varied, those of the freeholders being frequently distinguished as *chief rents* (*reditus capitales*), and both sorts being indifferently denominated *quit rents* (*quieti reditus*), because thereby the tenant goes quit and free of all other services. When these payments were received in silver or white money, they were antiently called white rents (*reditus albi*), in contradistinction to rents reserved in grain or baser money, which were called black mail (*reditus nigri*) (*a*).] Quit rents are rent-service ; from which it follows that the lord is entitled, as of common right, to distrain for them when they fall into arrear (*b*). *Rack rent* is a term expressive only of the proportion a rent bears to the value of the tenement on which it is charged, or in respect of which it is reserved (*c*), —the rent being so termed when it is of the full value of the tenement or near it. A *fee farm rent* is where an estate in fee is granted subject to a rent in fee, of at least one-fourth of the value of the lands at the time of its reservation (*d*) ; and such rent appears to be called fee farm, because a grant of lands reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method of letting them for life or years ; and it results from former explanations, that such a rent, if created by a subject since the statute of *Quia emptores*, can never be a rent-service,—for no fealty can be due to the grantor ; and it must therefore be either a rent-seek or a rent-charge (*e*).

These are the general divisions of rent ; but though their correct apprehension is still of importance, the differences which formerly existed as to the remedies to be pursued

(*z*) 2 Inst. 19.
(*a*) 2 Inst. 19.
(*b*) 2 Watk. Cop. 191.
(*c*) 2 Bl. Com. p. 43.
(*d*) Co. Litt. 143 b ; Co. Litt. by Harg. 144 a, n. (5).
(*e*) Doug. 627, n. (1) ; Litt. 217.

in case of their non-payment, are, for practical purposes, nearly at an end; for it has been provided by the statute 4 Geo. II. c. 28, s. 5, that any rent-seek, rent of assize, or chief rent, which has been duly answered or paid for a limited period prior to the date of that Act, or which shall at any time thereafter be created,—may be recovered by the remedy of distress in the same manner as if such rent had been reserved upon a lease (*f*). Also, the Conveyancing Act, 1881 (*g*), contains the following general provisions regarding the recovery of rents which are in arrear, and also regarding the redemption of certain kinds of rents, that is to say:—Firstly, by sect. 44, any annual sum, whether charged on land or on the income of land, and whether payable half-yearly or otherwise (not being rent-service incident to a reversion), may, when in arrear for twenty-one days, be recovered by distress; and when in arrear for forty days, may be recovered either by entry upon and perception of the profits of the land or by means of a demise of the land to a trustee for a term of years, upon trust (by mortgage, sale, or otherwise) to raise the arrears together with the expenses; but these powers are applicable only where the document creating the rent comes into operation after the 31st December, 1881. And Secondly, by sect. 45, a quit-rent, chief-rent, perpetual rentcharge, or other perpetual annual sum issuing out of land (not being tithe-rentcharge or rent reserved under a lease or upon a sale or building grant), whensoever created, may be redeemed at the option of the owner (or part-owner) of the land, upon payment or tender to the owner of the rent (being an absolute owner or an owner otherwise competent to give a receipt therefor) of the amount certified, as the price of redemption, in and by a certificate of the Board of Agriculture (Copyhold Department) to be obtained by the landowner desirous of redeeming the rent; and he is to give the rent-owner one

(*f*) *Musgrave* v. *Emmerson*, 16 L. J. Q. B. 174.

(*g*) 44 & 45 Vict. c. 41.

calendar month's notice of his intention to pay or tender such amount for the redemption of the rent ; and on proof of such payment or tender, so made after such notice as aforesaid, the Board grants its certificate of redemption, and the land is thereupon and thereby absolutely freed and discharged of the rent. And we may here add, that with regard to rents belonging to a charity, the fact that they have been paid for twelve consecutive years is now made *primâ facie* evidence that such rents are perpetual rents ; and, in such a case, it is no longer necessary, as it was heretofore, to show the origin of such rents (*h*) : such rents will, however, be redeemable under the 45th section of the Conveyancing Act, 1881, above referred to.

With respect to the manner of creating rents, the owner of land may either grant thereout a rent, or he may grant the land itself, subject to a rent (*i*) ; and rent-charge or rent-seek may be constituted in either of these ways, but rent-service in the latter way only (*j*).

[Rent is due and payable upon the land from which it issues,—that is, if no particular place be mentioned in the reservation (*k*) ; but in the case of the sovereign, the payment must be either to the crown officers at the Exchequer, or to a receiver in the country (*l*). And rent is demandable and payable before the time of sunset of the day whereon it is reserved (*m*),—though some have said that it is not absolutely due till midnight (*n*).]

By the common law, if the estate or interest of the person entitled to the rent came to an end, in the interval between one of the days of payment and another (as where it determined by death, supposing the lessor to have been tenant for life), the periodical sum then accruing was entirely lost to him and his representatives (*o*) ; and

(*h*) 54 & 55 Vict. c. 17, s. 5.

(*i*) *Anon.* v. *Cooper*, 2 Wils. 375.

(*j*) Litt. ss. 217, 218.

(*k*) Co. Litt. 201 b.

(*l*) 4 Rep. 73.

(*m*) Co. Litt. 202 a ; *Acocks* v. *Phillips*, 5 H. & N. 114.

(*n*) 1 Saund. 287 ; *Lord Rockingham* v. *Penrice*, 1 P. Wms. 178.

(*o*) *Jenner* v. *Morgan*, 1 P. Wms. 392.

supposing the rent itself not to determine, but to continue payable to some person in remainder or reversion, the whole sum accruing in respect of such interval would have belonged to that person, though the greater portion of such period might have elapsed in the time of his predecessor. But, in extension of some prior enactments, passed to amend the common law on this head, it has now been provided by "The Apportionment Act, 1870" (33 & 34 Vict. c. 35), which repeals but re-enacts with amendments certain prior Acts (*p*), that after the passing of that statute, all rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall be considered as accruing from day to day, and shall be *apportionable* in respect of time accordingly; that the apportioned part of the same shall be payable (in the case of a continuing rent, annuity, or other such payment) as soon as the entire portion of which it forms a part shall become due, and not before,—and (in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise) as soon as the next entire portion would have been payable, and not before (*q*): and that the entire or continuing rent (including such apportioned part) shall be recovered by the heir or other person who, had the rent not been apportionable, would have been entitled to the entire portion, such apportioned part being afterwards recoverable by action from such heir or other person, by the executors or other persons entitled under the Act to claim the same.

Where the tenant under a lease has been lawfully evicted of part of the land demised and out of which the rent issues; or where part of the land demised and out of

(*p*) 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71; 14 & 15 Vict. c. 25; 23 & 24 Vict. c. 154; *Cattley* v. *Arnold*, 1 J. & H. 651; *Whitehead* v. *Whitehead*, Law Rep., 16 Eq. Ca. 528.

(*q*) 33 & 34 Vict. c. 35, ss. 3, 4; *Lawrence* v. *Lawrence*, 26 Ch. D. 795.

which the rent issues has been surrendered by the tenant to the lessor ; or where the lessor has aliened the reversion as to part,—in all these cases, the rent must be apportioned ; and so much of it only shall be payable to the lessor, as corresponds with the value of what is still held by the tenant under him (*s*) ; though where the tenant has been tortiously expelled by the act of the landlord himself even from a part of the premises only, there shall be no apportionment, but the whole rent will be suspended so long as the expulsion continues (*t*).

The doctrine of apportionment is not, it is to be remarked, confined to rent, but applies to other kinds of incorporeal hereditaments as well ; for if a man, seised of forty acres of land, to which common of pasture is appurtenant, aliene five acres of the land to another, the alienee will be entitled to common *pro tanto* ; that is, for all his commonable cattle *levant* and *couchant* on the five acres (*u*).

And as regards incorporeal hereditaments, generally, we may remark, that many of them are capable either of being annexed as an accessory to some hereditament corporeal, or of existing independently and *per se* ; being described, in the former case, as *appendant* or *appurtenant*, in the latter, as *in gross* (*x*) ; but corporeal hereditaments cannot be appendant or appurtenant to such as are corporeal, nor incorporeal (generally speaking) to incorporeal (*y*). Where, however, the connection of principal and accessory exists, the effect is that the thing appendant or appurtenant will pass (without any particular mention of it) by any conveyance or alienation of the land to which it is annexed ; and this whether the land be conveyed "with its appurtenances" or not (*z*). But if the principal be

(*s*) Co. Litt. 148 a ; *Bliss* v. *Collins*, 5 Barn. & Ald. 876 ; *Baynton* v. *Morgan*, 22 Q. B. D. 74.

(*t*) Gilb. Rents, 178.

(*u*) *Wyat Wild's Case*, 8 Rep. 78 b.

(*x*) Co. Litt. 121 b, 122 a.

(*y*) *Ibid.* n. (7) ; Plowd. 85, 168, 170 ; *Capel* v. *Buszard*, 6 Bing. 161.

(*z*) Co Litt. *ubi sup.* ; *James* v. *Plant*, 4 Ad. & El. 749.

expressly conveyed without the accessory, or the accessory without the principal—as in some instances may be done—the accessory becomes thereafter, in either case, a thing in gross (*a*).

Incorporeal hereditaments are not, in any strict and proper sense, the subjects of *tenure*, like those of the corporeal kind (*b*) ; but they satisfy, in general, the legal description of *tenements*, and are expressly held to be within the meaning of that word as used in the statute *De donis*,—so as to be capable of being *entailed* ; and where an incorporeal hereditament is appendant or appurtenant, it will of course, in respect of the land to which it is annexed, be subject to all the rules of tenure.

The same *estates* also may be had in incorporeal as in corporeal hereditaments ; and in many respects, they are upon the same footing with regard to *title*, even where title depends upon an actual *seisin* or occupation ; *e.g.*, the rule *seisina facit stipitem* had in general the same application to things incorporeal as to things corporeal,—that is to say, it governed all descents which took place on a death prior to the 1st of January, 1834 ; for if a man who died before that day had what is *equivalent* to corporeal seisin in hereditaments that were incorporeal,—if, for example, in the case of a rent, he had obtained the actual receipt of it—such constructive seisin made him the root of *descent* with respect to these hereditaments, though he was not himself the purchaser (*c*),—a rule which was inapplicable, however, to dignities or titles of honour (*d*) ; and now upon successions since that Act, the rule which has been mentioned as to corporeal, obtains also as to incorporeal hereditaments, viz. that descent is in all cases to be traced from the *purchaser* (*e*). So, hereditaments of

(*a*) Plowd. 381 ; Com. Dig. Append. and Appurt. (D.) ; 2 Saund. 32.

(*b*) Co. Cop. 97 ; Co. Litt. 20 a ; Bac. Ab. Tenure (A).

(*c*) Co. Litt. 15 b.

(*d*) *Ratcliffe's Case*, 3 Rep. 42 a.

(*e*) 3 & 4 Will. 4, c. 106, ss. 1, 2.

the latter as well as of the former description, fall within the doctrine of *special occupancy*,—for though it seems that at common law there could be no title by *common* occupancy to things of which no corporeal or actual seisin could be had, yet the heir might have taken as *special* occupant (*f*); and incorporeal hereditaments are now expressly included in all the legislative provisions with respect to estates *pur autre vie*, which we had occasion to notice in a former part of the work (*g*).

On the other hand, in some important particulars, the law of title to incorporeal things differs from that which applies to thing corporeal; for the former cannot in their nature pass by *feoffment*; but they have always been capable of passing by *grant* (*h*), and they were said (like remainders and reversions of hereditaments corporeal) to *lie in grant*, and not *in livery*. And they would also pass by means of a surrender by deed (*i*); and by any conveyance operating under the Statute of Uses,—for existing incorporeal hereditaments may be limited by way of use, and will be executed by that statute accordingly (*k*); and by the 44 & 45 Vict. c. 41, s. 62, easements (together with certain other liberties) may be created even *de novo* by way of use. Nor is it by grant alone that title may be made to an incorporeal hereditament; for, Firstly, rents may be created by *reservation* in a lease or other conveyance,—as where a man seised in fee demises land to another for life or years, the latter yielding and paying for the same a certain sum of money (*l*); and, Secondly, there are certain incorporeal hereditaments which may be claimed by *custom*,—as for all the inhabitants of a certain hamlet to have a right of way over a certain field for a particular purpose; but no man can by custom claim a *profit à prendre*

(*f*) *Bearpark* v. *Hutchinson*, 7 Bing. 186.

(*g*) *Vide sup.* pp. 313, *et seq.*

(*h*) 2 Sand. Uses, 33, 36, 37.

(*i*) Co. Litt. 338 a.

(*k*) 2 Sand. Uses, pp. 33, 49, 59, 111.

(*l*) Bac. Ab. Rent, C.; Litt. s. 217; *Wickham* v. *Hawker*, 7 Mee. & W. 72.

in the land of another (*m*); and accordingly, a custom for all the inhabitants of a certain hamlet to *take* from a private close, for the purpose of manure, sand drifted from the sea, would be bad in law (*n*),—save in the case of copyholders and in respect of their lord's waste. Besides which titles, there is also the claim by *prescription*, which applies to almost every kind of incorporeal hereditament (*o*) ; and as well to those which are appendant or appurtenant, as to those which are in gross (*p*),—but of course to incorporeal hereditaments only (*q*)

The subject of prescription demands special consideration : And, firstly, it is to be distinguished from custom,—custom being properly a *local* usage, and prescription being a *personal* one, attaching to a man and his ancestors, or to those whose estate he has (*r*). [For example, if there be a usage time out of mind in the parish of Dale, that all the inhabitants of that parish may dance on a certain close at all times for their recreation,—which is held to be a lawful usage,—this is strictly a custom, for it applies to the *place* in general, but not to any particular *person* (*s*) : but if the tenant who is seised of the manor of Dale in fee alleges, that he and all those whose estate he hath in the said manor have used, *time out of mind*, to have common of pasture in such a close, this is properly called a prescription, being a usage annexed to the *person* of the owner of this estate.]

Secondly, prescription is to be considered in two distinct points of view—first, as it exists at the common law ; and secondly, as it exists under the Prescription Act (2 & 3 Will. IV. c. 71).

(*m*) *Gateward's Case*, 6 Co. Rep. 596 ; *Goodman* v. *Mayor of Saltash*, 7 App. Ca. 733.

(*n*) *Blewitt* v. *Tregonning*, 1 Har. & W. 431.

(*o*) "*Prescriptio est titulus ex usu et tempore, substantiam capiens ab authoritate legis.*"—Co. Litt. 113 b.

(*p*) *Wilkinson* v. *Proud*, 11 Mee. & W. 35.

(*q*) *Ibid.*

(*r*) Co. Litt. 113 b ; 2 Bl. Com. 263.

(*s*) *Mounsey* v. *Ismay*, 1 H. & C. 729 ; *Mayor of Saltash* v. *Goodman*, 7 App. Ca. 633.

[First, with respect to prescription *at common law* :—The following points appear principally to deserve attention :—1. This title is always founded on the actual enjoyment of the thing in question ; and a mere claim, however often repeated or long continued, and whether its validity has been questioned or not, will not suffice to establish a prescriptive right ; moreover, the measure of the actual enjoyment is in general the measure of the right (*t*). 2. The enjoyment on which a prescription is founded, must have been constant and peaceable,—for, as a general rule, when it has been subject to interruption or to dispute, no title by prescription arises ; yet where the right is shown to have once attached in consequence of an uniform and tranquil usage for a sufficiently long tract of time, a wrongful interruption of the enjoyment during a subsequent period of comparatively short duration (as for ten or twenty years) will not destroy the prescription (*u*). 3. As to the length of time sufficient to establish the right, the rule of the common law is, that there must have been a usage *from time immemorial*, or, as it is technically termed, *from time whereof the memory of man is not to the contrary*,—which period (as before shown in our remarks upon *custom*) refers to so remote an era as the beginning of the reign of Richard the First (*y*) ; and therefore if the usage can be shown to have commenced at any time since that period, the prescription (where it is claimed at common law) is destroyed (*z*) ; but a commencement shown prior to the reign of Richard the First, would constitute no objection,—for all time prior to that era is considered as out of the time of legal memory (*a*). Also, supposing no evidence to be given as to the time at which the usage

(*t*) *Manifold* v. *Pennington*, 4 Barn. & Cress. 161 ; *Jones* v. *Richards*, 6 Ad. & El. 532.

(*u*) Co. Litt. 114 b ; 2 Inst. 653 ; Com. Dig. Prescription, E. ; *Brodie* v. *Mann*, 10 App. Ca. 378.

(*y*) Co. Litt. 115 a.

(*z*) *Bryant* v. *Foot*, Law. Rep. 3 Q. B. 497 ; *Mills* v. *Colchester*, *ibid.*, 3 C. P. 575.

(*a*) 9 Rep. 27 b ; Com. Dig. Prescription, Pract. lib. ii. ch. 22 ; Stark. Ev. 1205.

[commenced, but that it appears, either by the testimony of living witnesses, or by other means of proof (*b*), that it has had continuance for a period of *twenty years* or more, this will in general amount, at common law, to a presumption that it is immemorial,—so far, at least, as to sustain the prescription, supposing no circumstances of a contrary tendency to appear (*c*); and even proof of a shorter continuance than twenty years will have the same effect, if corroborated by other attendant circumstances indicative of the existence of an antient right (*d*); but the presumption of immemorial right, that would otherwise arise from an enjoyment of twenty years, will be defeated by showing that such enjoyment took place by virtue of a grant or licence from the party interested in opposing it, or that the enjoyment was without his knowledge during the whole time that it was exercised (*e*). 4. Every prescription must be both certain and reasonable,—therefore a prescription to pay for tithes one penny *or thereabouts* for every acre of arable land, or to take as much clay *as shall be required* for making bricks at a certain kiln out of another's field, is bad in law (*f*); and thus, too, a surplice fee claimed on marriage was held unsustainable, on the ground that, according to the value of money at the supposed origin of the prescriptive right, it was *excessive in amount* (*g*). 5. All prescription at common law must be laid either in a man and *those whose estate he hath* in certain lands (as in the example above given of a prescriptive common of pasture),—which is called prescribing in a *que estate* (*h*); or it must be in a man *and his ancestors* (*i*);

(*b*) Stark. Ev. 1217, 1st edit.; Co. Litt. 115 a.

(*c*) *Rex* v. *Joliffe*, 2 Barn. & Cress. 59; *Daniel* v. *North*, 11 East, 372; *Chad* v. *Tilsed*, 2 Brod. & Bing. 403.

(*d*) Stark. Ev. 1217, 1st ed.

(*e*) *Bright* v. *Walker*, 4 Tyr. 509.

(*f*) Com. Dig. Prescription, E. 3; *Hilton* v. *Granville*, 5 Q. B. 701.

(*g*) *Bryant* v. *Foot*, Law Rep., 3 Q. B. 497.

(*h*) *Padwick* v. *Knight*, 22 L. J., Exch. 198.

(*i*) *Mellor* v. *Spateman*, 1 Saund. 342.

[and here this distinction is to be made—that if a man prescribes in a *que estate*, nothing is claimable by this prescription, but such things as are incident (appendant or appurtenant) to lands,—for it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but if he prescribes in himself and his ancestors, he may prescribe for anything whatever that might be the subject of grant (*k*). And, formerly, a man might by the common law have prescribed for a right which had been enjoyed by his ancestors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years; but by the 32 Henry VIII. c. 2, no person shall make any prescription by the seisin or possession of his ancestor, unless such seisin or possession has been within threescore years next before such prescription made. 6. A prescription in a *que estate* must, also, always be laid in him that is tenant of the fee; and therefore a tenant for life, for years, or at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates (*l*),—for as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man. And, therefore, the tenant for life must prescribe under cover of the tenant in fee simple,—*e.g.*, if tenant for life of a manor would prescribe for a right of common, as appurtenant to the same, he must allege that John Stiles was seised in fee of the manor; and that he, and all those whose estate he had, had immemorially used to have this right of common appurtenant to the said manor; and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 7. A prescription cannot lie for a thing which could not be raised by grant,—for the law allows prescription only to supply the loss of a grant; and therefore every prescription presupposes a grant to have

(*k*) Co. Litt. 121 a.

(*l*) 4 Rep. 31, 32.

[existed; *e.g.*, the lord of a manor cannot prescribe to raise a tax or toll upon strangers,—for such claim could never have been good by grant, and it shall not be good by prescription (*m*). 8. Another rule is, that what is to arise by matter of record, cannot be prescribed for,—for instance, the right to forfeitures; for forfeitures are found by the inquisition of a jury, and so made a matter of record, and prescription (which is a mere usage *in pais*) cannot extend to these (*n*). But certain franchises,—*e.g.*, the franchises of treasure trove, waifs, estrays, and the like,—may be claimed by prescription; for they arise from private contingencies, and not from any matter of record (*o*). 9. Lastly, a person having title to anything by prescription, is not to be considered as being himself the purchaser, so as to make it descendible to his heirs general, according to the ordinary rule of inheritance,—for prescription is rather to be considered as evidence of a former acquisition, than as an acquisition *de novo*; and the rule is, that where a man prescribes for (say) a right of way in himself and his *ancestors*, the right will descend only to the blood of that line of ancestors in whom he so prescribes; but if he prescribes in a *que estate*, the right will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase,—for every accessory followeth the nature of its principal.] And note, that a *right* arising in one or more persons by prescription may (and frequently does) give rise to a prescriptive *liability* in another or others, *e.g.*, the liability attaching by prescription to the sea-frontagers in Essex, to repair the sea-walls there (*p*).

The Prescription Act (2 & 3 Will. IV. c. 71), which is described as an Act "for shortening the *time* of prescription

(*m*) *Potter* v. *North*, 1 Vent. 387.

(*n*) 2 Bl. Com. 265; Co. Litt. 114 a; *Case of Abbot of Strata Marcella*, 9 Rep. 24 a.

(*o*) Co. Litt. 114 b.

(*p*) *The Queen* v. *Commissioners of Sewers for Essex*, 14 Q. B. D. 561.

in certain cases," is commonly said to have originated in a reasonable dissatisfaction with the rule, which required an enjoyment from "time immemorial" as the foundation in every case of a prescriptive right; for the effect of that rule was, that while, in general, an enjoyment for even *twenty* years sufficed to sustain a claim by prescription, yet—if accident should supply the adverse party with the means of proving that, at any period subsequent to the commencement of the reign of Richard the First, the alleged right did not in fact exist—the claimant would have been defeated, even though he could prove that the usage had lasted for centuries; and it was to obviate that inconvenience that the Act was passed. And accordingly, the Act has provided:—

Firstly, with respect to rights of common and other profits *à prendre in alieno solo*, that where there shall have been an enjoyment of them by any person claiming right thereto (*q*), without interruption (*r*), for *thirty* years (*s*) next before the commencement of any action upon the subject (*t*), the prescriptive claim shall no longer be defeated, by showing only that the enjoyment commenced at a period subsequent to the era of legal memory; but the claim may be defeated in any other way in which it was defeasible before the statute passed (*u*),—so that, *e.g.*, a case of thirty years' enjoyment would still be satisfactorily answered, by showing that the enjoyment was without the knowledge of the adverse party, or that it was by his mere licence or permission (*x*); and nothing is to be deemed an *interruption* of the right, unless it shall have

(*q*) *Kinloch* v. *Nevile*, 6 Mee. & W. 795.

(*r*) *Eaton* v. *Swansea Waterworks Company*, 20 L. J. Q. B. (N.S.) 482; *Carr* v. *Foster*, 3 Q. B. 581.

(*s*) *Richards* v. *Fry*, 7 Ad. & El. 698; *Wright* v. *Williams*, Tyr. & Gr. 375.

(*t*) *Bailey* v. *Appleyard*, 8 Ad. & El. 161, 778; *Ward* v. *Robins*, 15 Mee. & W. 237.

(*u*) *Mill* v. *New Forest Commissioners*, 18 C. B. 60; *Seddon* v. *Bank of Bolton*, 19 Ch. D. 462.

(*x*) *Bright* v. *Walker*, 4 Tyr. 509 *Kinloch* v. *Nerile*, 6 Mee. & W. 795.

been submitted to or acquiesced in for the space of one year (*y*),—a mere cessation of the enjoyment being neither an interruption nor a discontinuance of the right (*z*). The Act also provides, that the time during which the adverse party shall have been an infant, idiot, non compos mentis, feme coverte, or tenant for life, or during which any action as to the claim shall have been pending and diligently prosecuted,—shall be excluded in the computation of the period of thirty years (*a*); but that where there has been an enjoyment for *sixty* years, the claim shall be absolute and indefeasible,—unless proof is given, that the enjoyment took place under some consent or agreement *in writing*, expressly given for the purpose. And in addition to these regulations as to the time for a prescription, there are others as to the manner of making it, and among them the following,—that he who prescribes under the Act shall not be required in any case to claim *as in right of the owner of the fee* (*b*); and that, as regards *time*, no time falling short of the full time prescribed by the Act shall raise any presumption of right under the Act.

And, Secondly, with regard to ways and other easements (*c*), watercourses and the use of water (*d*),—and with regard also to lights (*e*),—the Act contains similar provisions; but the periods conferring a prescriptive right in the case of ways and other easements, watercourses and waters, are *twenty* and *forty* years (in lieu of thirty and sixty years) respectively; and when the land or water as against which the claim is made has been held for term of life or for a term exceeding three years, such term is to be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion

(*y*) 2 & 3 Will. IV. c. 71, s. 4.

(*z*) *Hollins* v. *Verney*, 11 Q. B. D. 715; 13 Q. B. D. 304.

(*a*) 2 & 3 Will. 4, c. 71, s. 7; *Pye* v. *Mumford*, 11 Q. B. 666.

(*b*) Sect. 5; *Earl de la Warr* v. *Miles*, 17 Ch. D. 535.

(*c*) *Angus* v. *Dalton*, 6 App Ca. 740.

(*d*) *Murgatroyd* v. *Robinson*, 7 Ell. & Bl. 391.

(*e*) *Wheeldon* v. *Burrows*, 12 Ch. Div. 31; *Russell* v. *Watts*, 10 App. Ca. 590.

resisting the claim within three years after the term determines (*f*); and these provisions appear to be applicable to an easement for the passage of *air*,—*scil.*, through a defined aperture (*g*); while as regards lights, the uninterrupted enjoyment of these for *twenty* years, constitutes at once an absolute and indefeasible right to them, any local usage or custom to the contrary notwithstanding (*h*); but, of course, even as regards lights, the claim may be defeated by showing that the enjoyment took place under some agreement in writing (*i*).

Incorporeal hereditaments are capable of *extinction*; and they may, *e.g.*, be extinguished by a *release* (*j*),—as when a person entitled to common, releases the right of common to the owner of the soil over which it is claimed; and common may even be released in part (*k*); also, after a disuse for twenty years, a release will in general be presumed (*l*). Incorporeal hereditaments may also be extinguished by *unity of seisin*,—as where the person entitled to a way or common becomes seised in fee of the land which is subject to the right; for the dominion of the soil itself, and of an incorporeal right relating to the same soil, cannot, in general, subsist together in the same individual; because as soon as they are combined in his person, the latter right, being merely of a particular and subordinate kind, is absorbed and extinguished in the general ownership (*m*),—franchises being an exception to this rule; for these, as before remarked, are of a nature *collateral* to the inheritance itself, and are consequently

(*f*) 2 & 3 Will. 4, c. 71, s. 8; *Symons* v. *Leaker*, 15 Q. B. D. 629.

(*g*) *Chastey* v. *Ackland*, [1895] 2 Ch. 389; *Webb* v. *Bird*, 13 C. B. (N.S.) 841.

(*h*) *Truscott* v. *Merchant Taylor's Company*, 11 Exch. 855; *Glover* v. *Coleman*, Law Rep. 10 C. P. 108.

(*i*) 2 & 3 Will. 4, c. 71, s. 5; *Seddon* v. *Bank of Bolton*, 19 Ch. D. 462.

(*j*) Co. Litt. 270 a, 280 a; *Lovell* v. *Smith*, 3 C. B. (N.S.) 127.

(*k*) *Benson* v. *Chester*, 8 T. R. 401

(*l*) *Ward* v. *Ward*, 7 Exch. 838; *Cook* v. *Bath*, Law Rep., 6 Eq. Ca. 177.

(*m*) 4 Rep. 38 a; Cro. Eliz. 570; *Winship* v. *Hudspeth*, 10 Exch. 5; *Barkshire* v. *Grubb*, 18 Ch. Div. 616.

not affected by any unity of seisin (*n*), although franchises also may, in certain cases, be extinguished, *e.g.*, by a re-union with the Crown, or by forfeiture for *misuser*, or for *nonuser* (*o*). And as regards *lights* and *watercourses*, these may be extinguished by abandonment,—that is, by the mere discontinuance of the enjoyment, though for a period short of twenty years; provided the abandonment be absolute,—for if it take place under circumstances which imply any intention of the future resumption of the right, the right in that case will not be lost (*p*).

(*n*) 4 Inst. 318.

(*o*) 3 Cruise, Dig. 302; *Northumberland* (*Duke*) v. *Houghton*, L R. 5 Exch. 137.

(*p*) *Stokoë* v. *Singers*, 8 Ell. & Bl. 31.

CHAPTER XXIV.

THE CONVEYANCING AND LAND ACTS OF 1881—1892.

THE statutes relating to the practice of conveyancing and to dealings with land generally, which have been passed in and subsequently to the year 1881, and principally the Conveyancing Acts, 1881, 1882, and 1892, and the Settled Land Acts, 1882—1890, are of an importance so general and far-reaching as to demand, and their provisions are of a character so specific as to necessitate, a more particular treatment than they have yet received in this treatise; and we shall accordingly give them a chapter to themselves, in which their various provisions, and incidentally the provisions of the Vendor and Purchaser Act, 1874, and of the Leases and Sales of Settled Estates Act, 1877, and some few provisions of an incidental character contained in other statutes, shall be expounded.

Firstly. By the Conveyancing Act, 1881 (*a*), it has been provided as follows:

That the word "heirs," or the phrase "heirs of the body," shall no longer be necessary in a *deed* as the words of limitation respectively for a fee simple, and a fee-tail estate; but it shall be sufficient in such deed to say that the estate is in fee simple, or in fee tail, as the case may be; and if in fee tail, that it is in fee-tail male or in fee-tail female, or in fee-tail simply if the estate intended to be conferred is in fee-tail general (*b*).

That freehold land (also choses in action) may be conveyed by one [or more] person [or persons] to himself [or themselves] jointly with another person [or other persons].

(*a*) 44 & 45 Vict. c. 41. (*b*) Sect. 51.

in like manner as it might be conveyed (that is to say, directly and without any grantee to uses) to another person; also, that a husband may in like manner convey direct to his wife, or a wife to her husband,—and in either case either alone or jointly with any other person [or persons] (*c*).

That the word "grant" need not be used in any conveyance (*d*); that in every conveyance the "estate clause" shall be implied, so that it is no longer necessary in any case to specify "all the estate, right, title, interest, claim, and demand" of the conveying party (*e*); also, in every conveyance the "general words" shall be implied, so that the old enumeration of "buildings, erections, ... hedges, fences, ... fixtures, ... sewers, gutters, drains . . . . privileges, easements, rights, and advantages whatsoever," need no longer be inserted in the conveyance, but the appropriate general words will in each case be implied, according as it is land simply that is being conveyed, or is land built upon, or is a manor (*f*),—but not so as to give to the conveyance any greater force or effect than if the *estate clause* and the appropriate *general words* had been expressly inserted therein.

That as regards the covenants theretofore usually inserted in purchase and in mortgage deeds of freehold and of leasehold land, these covenants shall be implied,—in each instance the covenants thereto appropriate,—provided that the conveyance is expressed to be made by the vendor or mortgagor (as the case may be) in the capacity in which he conveys, that is to say,—

> If the legal and beneficial owner is the conveying party, then it must be expressed that he conveys as "beneficial owner"; and in that case, if the deed is a purchase-deed of freehold lands, the limited covenants for title are implied; and if

(*c*) Sect. 50.
(*d*) Sect. 49.
(*e*) Sect. 63.
(*f*) Sect. 6.

the deed is a mortgage deed of freehold lands, the absolute covenants for title are implied, according to the distinction above explained (*g*), between the covenants given by a vendor and by a mortgagor respectively. And if the deed is a deed conveying leaseholds, then in addition to the covenants for title above referred to, there shall be implied, by force of the words "beneficial owner," the following further covenant and covenants, that is to say,—

If the deed is a purchase-deed, the usual limited covenant that the lease is valid, and that all rents, covenants, conditions, and agreements have been duly paid and performed up to the date of the conveyance ; and

If the deed is a mortgage deed, the usual absolute covenants, firstly, that the lease is valid, and that all rents and covenants, &c. have been duly paid and performed up to the date of the conveyance ; and secondly, that the mortgagor will, during the continuance of the security, continue to pay the rents and to observe and perform the covenants, conditions, and agreements reserved by and contained in the lease (*h*).

If the conveying party is not the legal and beneficial owner, but is only a trustee or mortgagee, or a legal personal representative or the like, then it must be expressed in the conveyance that he conveys as "trustee" or "mortgagee," or otherwise as the case may be ; and thereupon, and by force of such express description of his capacity, the usual (and very limited) covenant is implied that he (the conveying party) has not encumbered ; and

(*g*) *Supra*, p. 345. (*h*) Sect. 7.

If the conveying party, although both legal and beneficial owner, is conveying by way of settlement only, and in the conveyance he is expressed to convey as "settlor," then, and by force of such express description of his capacity, the usual (and very limited) covenant is implied, that he will make all (if any) necessary further assurance of the premises (*i*).

But it is to be observed, that the capacity in which the conveying party conveys must be expressed,—for otherwise no covenant will be implied (*k*) ; and note, that the benefit of all these implied covenants runs with the land (*l*); and note also, that where any incumbrance or the like appears on the face of the conveyance, the implied covenant must be guarded in some way against extending to such incumbrance (*m*).

Then, as regards the covenant for the production of the title deeds and for their safe custody in the meanwhile, which was usually inserted in purchase-deeds, where the vendor retained the deeds or any specified deeds, in lieu of that covenant (which used to run to a great although unavoidable length) it is sufficient to merely insert in the purchase-deed,—

An acknowledgment of the right of the purchaser to their production ; and

An undertaking for their safe custody (*n*).

As regards mortgage deeds, if the deed is expressed to be made by way of statutory mortgage, there shall be implied (*o*)—

A covenant to repay the principal and interest of the mortgage debt on the day therein specified, and to pay interest half-yearly thereafter upon the principal remaining unpaid ; and

(*i*) Sect. 7, E.
(*k*) Sect. 7, sub-s. (4).
(*l*) Sect. 7, sub-s. (6).
(*m*) *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11.
(*n*) Sect. 9.
(*o*) Sect. 26.

The usual proviso for reconveyance on the full discharge of the mortage debt.

Also, whether the mortgage deed is expressed or is not expressed to be made by way of statutory mortgage, there shall be implied (*p*)—

A power of sale in the mortgagee ;

A power in him to insure ;

A power in him to appoint a receiver ; and

A power in him (when in possession) to cut and sell timber ripe for cutting ;

but as regards the mortgagee's power of sale, that power is not to be exerciseable by him, unless one or other of the three events specified in the 20th section of the Act have arisen ; but should he duly exercise that power, then he may give receipts for the purchase-money (*q*) ; also, generally he may apply (in the mode and modes heretofore usual, and without any express power in that behalf) all moneys received by him under the sale, or from the insurance, or from the cutting of timber or otherwise (*r*).

As regards the property in mortgage, the mortgagee (when in possession) may, without the concurrence of the mortgagor, and the mortgagor (while in possession) may, without the concurrence of the mortgagee (*s*), exercise the following leasing powers, that is to say,—

May make an agricultural or occupation lease for any term not exceeding twenty-one years, to take effect in possession within one year from its date ; and

May make a repairing or a building lease for any term not exceeding ninety-nine years,—

the best rent obtainable being in every case reserved, and no fine, premium, or foregift being taken,—although in the case of a building or repairing lease, the rent during the first five years of the term may be nominal ; also, the

(*p*) Sect. 19.

(*q*) Sect. 22.

(*r*) Sects. 22—24.

(*s*) Sct. 18.

mortgagor (when he is the lessor) must deliver a counterpart of the lease to the mortgagee.

As regards contracts for sale and the abstract of title to the property sold, the Conveyancing Act, 1881, in extension of the Vendor and Purchaser Act, 1874 (*t*), makes many useful provisions calculated to save the vendor expense; and by the combined effect of the two Acts, the law now prevailing as to such contracts and abstracts may be stated as follows:—

That forty years, and not sixty years, shall be the length of the abstract (*u*).

Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold (*y*).

Under a contract to sell and assign an existing term of years derived out of a leasehold interest in land (*z*), or under a contract to grant a lease for years, *i.e.*, a new term of years, to be derived out of a leasehold interest in land (*a*), the intended assign or lessee shall not have the right to call for the title to the leasehold reversion.

Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*b*).

Where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last

(*t*) 37 & 38 Vict. c. 78.
(*u*) Act, 1874, s. 1.
(*y*) *Ibid.* s. 2.
(*z*) Act, 1881, s. 3, sub-s. (1).
(*a*) *Ibid.* s. 13.
(*b*) *Ibid.* s. 3, sub-s. (2).

rent (not being a mere peppercorn rent) (*c*) due under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*d*).

Where land sold is held by underlease, the purchaser shall assume, unless the contrary appears, that the underlease and every superior lease were duly granted ; and on production of the receipt for the last rent (not being a peppercorn rent) due under the underlease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date (*e*).

Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*f*), just as (under the 14 Geo. II. c. 20) a common recovery would, under the like circumstances, have been presumed after twenty years.

(*c*) *In re Moody and Yates' Contract*, 28 Ch. D. 661 ; 30 Ch. D. 344.

(*d*) Act, 1881, s. 3, sub-s. (4).

(*e*) Act, 1881, s. 3, sub-s. (5) ; *Laurie* v. *Lees*, 7 App. Ca. 19.

(*f*) Act, 1874, s. 2.

Preliminary contracts for leases need not be abstracted at all (*g*); and a purchaser of any property shall not require the production (or any abstract or copy) of any deed, will, or other document, dated or made before the time prescribed by law or stipulated for the commencement of the title, — even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall the purchaser require any information, or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced, or noticed; and the purchaser shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document forming part of that prior title are correct, and that they give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected (if and as required) by fine, recovery, acknowledgment, inrolment, or otherwise (*h*).

On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all

(*g*) Act, 1882, s. 4; also Settled Land Act, 1882, s. 31, sub-s. (4).

(*h*) Act, 1881, s. 3, sub-s. (3).

certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, and office (or other) copies of, or abstracts of, or extracts from, any Acts of Parliament, or other documents not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract or for any other purpose, shall be borne by the purchaser who requires the same ; and where the vendor retains possession of any document, the expenses of making any copy thereof (attested or unattested) which a purchaser requires to be delivered to him, shall be borne by that purchaser (*i*).

On a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense (*k*).

The inability of the vendor to furnish the purchaser with a legal covenant to produce (and furnish copies of) documents of title shall not be an objection to the title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents (*l*).

Such covenants for production as the purchaser can and shall require shall be furnished at his expense ; and the vendor shall bear the expense only of the perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser (*m*).

(*i*) Act, 1881, sub-s. (6); *Johnson* v. *Tustin*, 28 Ch. Div. 84; 30 Ch. Div. 42.

(*k*) Act, 1881, sub-s. (7).

(*l*) Act, 1874, s. 2.

(*m*) *Ibid.*

Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents (*n*).

And as regards the conveyance of the property sold, and the parties to such conveyance, and the completion generally of the purchase, the provisions are as follows:—

The vendor entitled legally and beneficially will of course convey; and in case of his death, his personal representatives may (in lieu of his heir or devisee) do so (*o*).

Any legal estate outstanding in any trustee or mortgagee will be conveyed by him; and in case of his death, his personal representative shall (in lieu of his heir or devisee) do so (*p*),—provided the land be of freehold tenure, but not now if the land be of copyhold tenure (*q*): also, if the trustee being a bare trustee be a married woman, then he (*scil.* she) may convey the legal estate as if she were a *feme sole* (*r*).

When the property sold is subject to any incumbrance, and the incumbrancer either cannot or will not concur to release his charge, the court will in a proper case make an order discharging the land, and substituting some other adequate security, and this whether the incumbrancer assents or not (*s*).

When the property sold is subject to any quit rent, chief rent, rentcharge, or other perpetual annual sum, not being rent reserved in lieu of any purchase money, it may be discharged therefrom, upon certificate of the Board of Agriculture (Copyhold Department) specifying the redemption

(*n*) Act, 1874, s. 2.
(*o*) Act, 1881, s. 4.
(*p*) *Ibid.* s. 30.
(*q*) 57 & 58 Vict. c. 46, s. 88, repeating the 50 & 51 Vict. c. 73, s. 45; *In re Mills*, 37 Ch. D. 312; 40 Ch. Div. 14.
(*r*) Act, 1874, s. 6, as continued by 56 & 57 Vict. c. 53, s. 16.
(*s*) Act, 1881, s. 5.

value thereof, and upon payment or tender of that value, and upon a further certificate of the Board, such further certificate certifying *simpliciter* that the rent in question is redeemed (*t*).

The conveyance need not be executed by the vendor in the presence of the purchaser, but (if the purchaser requires it) the execution by the vendor must be attested by a nominee of the purchaser (*u*).

A receipt for the purchase-money may be embodied in the purchase-deed, and will be sufficient without any receipt for same being endorsed on that deed (*y*) ; and such receipt, whether in the body or on the back of the deed, shall be conclusive evidence of the fact, excepting as between the parties and their privies (*z*).

When the purchase-deed contains such receipt, either in the body or on the back thereof, the purchaser may pay his purchase-money to the vendor's solicitor producing the purchase deed duly executed (*a*) ; and by reason of the Trustee Act 1888 (*b*), altering the former law in this respect (*c*), the purchase-money might in such a case be so paid, notwithstanding that the vendor might be in fact a trustee, a provision which has been re-enacted by the Trustee Act, 1893 (*d*).

And the Conveyancing Act, 1881 (*e*), provides generally, in favour of a purchaser (lessee or mortgagee) or intending purchaser (lessee or mortgagee), that any order of the Chancery Division under any statutory or other jurisdiction shall (in effect) be a full protection to the

(*t*) Act, 1881, s. 45.
(*u*) *Ibid.* s. 8.
(*y*) *Ibid.* s. 54.
(*z*) *Ibid.* s. 55.
(*a*) *Ibid.* s. 56.
(*b*) 51 & 52 Vict. c. 59, s. 2.
(*c*) *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.
(*d*) 56 & 57 Vict. c. 53, s. 17.
(*e*) Sect. 70; *In re Hall-Dare's Contract*, 21 Ch. Div. 41.

purchaser purchasing under or upon the faith of such order ; and the Conveyancing Act, 1882 (*f*), in order to further assure the purchaser, once his purchase is completed, provides that if he obtain an official certificate of the result of searches for judgments, deeds, &c., &c., required to be registered or enrolled, he shall be thereby absolutely protected against everything of that sort not appearing on such certificate, and shall not be affected by notice of anything whatsoever prejudicial to his title, unless he have actual notice thereof, or such constructive notice as in the Act expressed.

As regards rentcharges created by deed or will, and with a view to shortening the documents creating the same, it has been provided (*g*), that, without any express provision in the deed or will to that effect, the person entitled to the rentcharge issuing out of or charged upon lands or the income thereof, shall have the following remedies for the recovery thereof, that is to say :—(1) In case the rent remains unpaid for twenty-one days, a power to distrain therefor like a landlord for rent due on an ordinary lease ; and (2) In case the rent remains unpaid for forty days, a power to either enter upon and receive the rents and profits of the land until payment, or (with or without entry) to demise the land to a trustee upon trust (by sale, mortgage, or otherwise) to raise the arrears of rent and all expenses.

As regards leases, the Conveyancing Act, 1881, in addition to providing for the grant thereof, and for the assignment (on the sale) thereof as hereinbefore expressed, provides also for the maintenance of the lease and for the restoration thereof as follows, that is to say,—

Firstly, as regards the Maintenance of the Lease, it provides (by sect. 10) in favour of the lessor (*h*),—That the rent reserved by the lease, and the benefit of every

(*f*) Sects. 2, 3; *Bailey* v. *Barnes*, [1894] 1 Ch. 25.

(*g*) Act, 1881, s. 44.

(*h*) *Baynton* v. *Morgan*, 22 Q. B. D. 74.

covenant or provision on the lessee's part therein contained (*having reference to the subject-matter thereof*) and of the condition of re-entry therein contained, shall be annexed to and go with the reversion immediately expectant on the lease,—and this notwithstanding the severance of that reversion ; and (by sect. 11) in favour of the lessee (*i*),—That the obligation of every covenant on the lessor's part contained in the lease (*having reference to the subject-matter of the lease*) shall, if and as far as the lessor has power to bind the reversion immediately expectant on the lease, be annexed to and go with that reversion,—and this notwithstanding the severance of that reversion ; and (by sect. 12) as regards conditions of re-entry (and other conditions), when either the reversion upon the lease is severed or the lease itself as to part of the hereditaments thereby demised is determined,—That (notwithstanding such severance of the reversion or such cesser of the term as to part of the land) every condition of re-entry (or other condition) shall be apportioned, and remain annexed to the several parts of the reversion, and be in force, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, had alone originally been comprised in the lease.

And secondly, as regards the Restoration of the Lease (the phrase "*lease*" now extending to an underlease, and also to agreements for leases or underleases which are specifically enforceable by the intended lessees (*k*), and also to fee-farm demises), the Act provides (by sect. 14) for relieving against the forfeiture of the lease (being a forfeiture accruing otherwise than for breach of the covenant or condition against assigning or underleasing, or otherwise than for bankruptcy, or for suffering an execution, or for breach, in the case of a mining lease, of the covenant for inspection), and for this purpose enacts (*l*)

(*i*) *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522.

(*k*) 55 & 56 Vict. c. 13, s. 5.

(*l*) *Quilter* v. *Mapleson*, 9 Q. B. D. 672.

as follows:—That the right of re-entry for the forfeiture shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying (with considerable exactness) (*m*) the particular breach complained of, and requiring the lessee to remedy the breach (if and so far as remediable), and otherwise requiring him to make compensation in money for the breach; and the lessee is to have a reasonable time thereafter to remedy the breach, or to make compensation to the lessor for the breach; but subject to that notice being first given, then the lessor is entitled (in case the notice is not complied with) to enforce the forfeiture by ejectment in the usual way,—receiving, in general, the rent which shall have accrued due during the currency of the notice (*n*). But where a lessor is proceeding by action or otherwise to enforce the forfeiture, the lessee may in the lessor's action,—or if the lessor shall not yet have actually entered for the forfeiture (*o*), the lessee may in any action brought by himself,—apply to the court for relief; and the court may in its discretion grant or refuse the relief, on such terms as to costs, expenses, damages, compensation, penalty, or otherwise, as the circumstances of the case may require,—the lessee paying in all cases the lessor's expenses including his valuer or surveyor's charges (*p*); and these provisions for the relief of lessees against the forfeiture of their own leases have been (in substance) made applicable also to their relief against the loss of their leases through or consequent upon the forfeiture of the superior lease (if any) (*q*). Also, forfeiture on the ground of the bankruptcy of the lessee, or on the ground of an execution levied, is now made relievable under the Act, provided the lease be sold

(*m*) *Fletcher* v. *Nokes*, [1897] 1 Ch. 271; *Gregory* v. *Serle*, [1898] 1 Ch. 652.

(*n*) *Penton* v. *Barnett*, [1898] 1 Q. B. 276.

(*o*) *Roger Cholmeley's School* v. *Sewell*, [1893] 2 Q. B. 254; *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.

(*p*) 55 & 56 Vict. c. 13, s. 2; *Nind's Case*, [1894] 2 Q. B. 226.

(*q*) 55 & 56 Vict. c. 13, s. 4.

within a year from the bankruptcy or execution (*r*), and lessors are no longer able to obtain any profit to themselves in giving licences to assign (*s*),—which licences are not to be arbitrarily withheld (*t*) ; but lessors may still stipulate for a security for the due performance of the conditions of the lease (*u*).

And here it will be convenient,—although partly by way of digression,—to consider the long terms of years, which were at one time very commonly created (and which still may be created) in lands by way of giving a security for money lent, where it was not (and is not) desired to mortgage the fee simple (*w*). Long terms of years have also at all times been, and still are, commonly created in settlements and wills, for securing pin-money to wives, jointures to widows, and portions to the younger children of the marriage. And firstly, it is obvious, that when the purposes for which these terms were created were satisfied, the terms themselves became satisfied terms, and ought properly to have ceased. And, occasionally, under an express proviso in that behalf (called a proviso for *cesser*) these long terms did in fact cease, although they were more commonly kept alive. For example, upon a purchase of land, where the land had been mortgaged for a long term of years, and upon the purchase the mortgage was paid off out of the purchase-money,—it was usual for the purchaser (instead of taking a surrender of the term to himself, and so merging it in the fee-simple inheritance which he had purchased) to keep the term on foot and have it assigned to a trustee of his own nomination, in trust for himself (the purchaser), "*to attend and protect the inheritance*,"—that is to say, to follow and be held upon (or to wait upon) the limitations of the inheritance (*x*).

(*r*) 55 & 56 Vict. c. 13, s. 2 (2).

(*s*) *Ibid.*, s. 3.

(*t*) *Conquest* v. *Ebbetts*, [1896] A. C. 490.

(*u*) *In re Cosh's Contract*, [1897] 1 Ch. 9.

(*w*) *Lillingston* v. *Pares*, 12 Ch. Div. 333.

(*x*) *Best* v. *Stamford*, Prec. Ch. 252; *Wray* v. *Williams*, 1 P. Wms. 137 ; *Cooke* v. *Cooke*, 2 Atk. 67.

And the effect of obtaining such an assignment was this, namely:—The long term was as good as merged in the inheritance, and yet afforded the purchaser a certain protection which he would not have had if a merger had actually taken place,—that is to say: If it afterwards turned out, that, prior to the purchase, but posterior to the creation of the term, there had been some intermediate alienation or incumbrance of the fee in favour of another person, of which the subsequent purchaser had no notice when he took his conveyance and paid his purchase-money, the latter purchaser would, through the medium of the term, be protected against the mesne incumbrance or alienation; and in this way, that is to say,—the long term would have priority over such mesne alienation or incumbrance, and, being assigned expressly in trust for the latter purchaser, it became (for all purposes) his property; but no such protection resulted from such satisfied term where the precaution of thus assigning it had been in any particular purchase neglected,—for the mortgage term, if left outstanding and not assigned, would not be held in trust for the second purchaser at all.

The protection so afforded by the assignment of such satisfied terms often occasioning, however, prejudice to innocent persons, and the necessity to ensure that protection for their assignment on every individual purchase being fraught with expense,—therefore, by the Satisfied Terms Act, 1845 (8 & 9 Vict. c. 112) (*y*), it was enacted, regarding such long terms of years, that such of them as should (either by express declaration or by construction of law) be on the 31st December, 1845, attendant upon the inheritance or reversion of any lands, should on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof they should be so attendant,—subject only to this, that every such term of years made so attendant by *express declaration* (although by the Act made

(*y*) *Doe* d. *Hall* v. *Moulsdale*, 16 Mee. & W. 689; *Plant* v. *Taylor*, 7 H. & N. 211.

to cease and determine), should afford to every person the same protection as it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after the 31st December, 1845, and should, for the purpose of such protection, be considered both at law and in equity to be a subsisting term ; and further, that such of them as should become satisfied after the 31st December, 1845, and should either by express declaration or by construction of law, become attendant upon the inheritance or reversion of any lands, should, immediately on the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such terms should become so attendant.

Secondly, under the provisions contained in the Conveyancing Acts, 1881 (*z*) and 1882 (*a*), long terms of years may now in certain cases, be enlarged into fee simple estates,—the terms which may be so enlarged being terms which in their first creation were of not less than 300 years, and of which not less than 200 years remain unexpired, and which are without any trust or equity of redemption in favour of the freeholder or other reversioner, and also without any rent or with merely a peppercorn or other like nominal rent, or the rent of which (not having been of that class) has been since released, barred, or otherwise lost ; also, the terms must not be liable to be determined for condition broken ; and if they are sub-terms, the superior term (as well as the sub-term) must answer the above description. The enlargement is effected by a simple declaration by deed to the effect that the term shall be enlarged ; and the person to make the declaration is (substantially) the person legally and beneficially entitled to the term, subject or not subject to any incumbrance ; and the fee simple which is substituted for the term is

(*z*) 44 & 45 Vict. c. 41, s. 65.

(*a*) 45 & 46 Vict. c. 39, s. 11 ; *Re Chapman & Hobbs*, 29 Ch. Div. 1007 (where one penny was held to be a nominal rent) ; and *Re Smith & Stott*, *ibid.* 1009 n. (where three shillings was held to be a rent having some money value).

subject to all the same estates, rights, and interests, as the original term ; and it carries the mines and minerals, unless these have already become,—by severance, express exception, or otherwise,—a separate inheritance.

As regards Infants,—the management of their estates, and their maintenance,—the Conveyancing Act, 1881, with a view principally to shortening the forms in settlements and wills, provides as follows :—That an infant's fee-simple estate or his leasehold term shall be deemed a settled estate within the meaning of the Settled Estates Act, 1877, so as to introduce all the powers of sale and of leasing conferred by that Act upon tenants for life (*b*), and which powers are hereinafter more specifically referred to ; and that during the infancy (of a male), or the infancy and discoverture (of a female), the trustees (if any) appointed for this purpose by the settlement, and (failing them) the persons (if any) who are for the time being under the settlement trustees with power of sale of the settled land (or of any part thereof) or with power of consent to or approval of the exercise of such power of sale,—and (failing them) any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant,—may enter into and continue in possession of the land, and may exercise the following powers (*c*), that is to say :—(1) Manage or superintend the management of the land,—with power to fell timber or cut underwood in the usual course ; and with power to rebuild (and to repair) houses and other buildings, and to continue the working of mines, and to drain or otherwise improve the land, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies and to accept surrenders and the like,—the trustees being (in their management) subject to (but subject only to) the

(*b*) 44 & 45 Vict. c. 41, s. 41

(*c*) Sect. 42 ; *Jackson* v. *Talbot*, 21 Ch. Div. 786 ; *Wilson* v. *Turner*, 22 Ch. Div. 521 ; *Welch* v. *Channell*, 26 Ch. Div. 58, 63.

same restrictions as the infant, if of full age, would be subject to (*d*) ; and (2) Out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, and all outgoings not properly payable by any other person, and the interest on mortgage debts (*e*) ; and (3) Apply at discretion any income for the infant's maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian to be applied for the same purposes (*f*) ; and thereafter (4) Invest the residue of the income, accumulating the income of the investments in the way of compound interest ; and (5) Stand possessed of the accumulated fund (without prejudice to their right to apply such fund as if the same were income of the current year) (*g*), on the trusts following (namely) : Firstly, If the infant attains the age of twenty-one years, then in trust for the infant ; or if the infant being a female marries while an infant, then in trust for the infant for her separate use ; but Secondly, If the infant dies while an infant and, being a female, without having been married, then (subject to any settlement affecting the fund or the land from which the income has arisen) in trust for the infant's personal representatives as part of the infant's personal estate. The Act also provides (*h*), that where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age (*i*), the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof,

(*d*) 44 & 45 Vict. c. 41, s. 42, sub-s. (2).

(*e*) Sect. 42, sub-s. (3).

(*f*) Sect. 42, sub-s. (4).

(*g*) Sect. 42, sub-s. (5).

(*h*) Sect. 43. See *Judkins' Trusts*, 25 Ch. Div. 743; *Thatcher's Trusts*, 26 Ch. Div. 426.

(*i*) *In re Jeffery*, [1891] 1 Ch. 671 ; *In re Burton's Will*, [1892] 2 Ch. 38 ; *In re Holford*, [1894] 3 Ch. 30.

whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not; and the trustees are to accumulate the residue at compound interest, and to hold these accumulations (without prejudice to their right to apply them as income of the current year) for the benefit of the person who ultimately becomes entitled to the property from which the same arise (*k*).

(*k*) The provisions of the Conveyancing Act, 1882, are of a character purely incidental to those of the Conveyancing Act, 1881; and such of them as require special notice in the text of this treatise have been incorporated in the statement hereinbefore given of the provisions of the last-mentioned Act. These two Acts contain, also, some provisions of great importance, but which are too special to be referred to in the text. Of these more special provisions, the Conveyancing Act, 1881, contains the following:—The duty of the mortgagee to transfer instead of re-conveying (s. 15), and to permit the mortgagor to inspect his title-deeds (s. 16); the abolition of the consolidation of mortgages (s. 17); the sale of mortgaged estates on interlocutory order in the Chancery Division (s. 25); the divers provisions (ss. 31—38) relative to the appointment of new trustees and the retirement of the old trustees and the vesting of the trust property and the powers of trustees, which have now been repealed and re-enacted by the Trustee Act, 1893; and the execution by married women of powers of attorney (s. 40); and the execution of powers of attorney generally (ss. 46—48). And of the more special provisions referred to, the Conveyancing Act, 1882, contains the following:—The duty of the mortgagee to transfer instead of re-conveying, and to whom (s. 12); the execution and duration of powers of attorney generally (ss. 8, 9); and the provision (s. 5) relative to separate sets of trustees which was afterwards amended (Conveyancing Act, 1890, s. 6), but which, with the amendment, has now been repealed and re-enacted by the Trustee Act, 1893. Some other minor points in the Acts have also been incidentally dealt with already (or will be dealt with) in a sufficient manner in other portions of this work, viz., the following:—the release and disclaimer of powers (Conveyancing Act, 1881, s. 52; Conveyancing Act, 1882, s. 6); the acknowledgment of deeds by married women (Conveyancing Act, 1882, s. 7); the restriction on executory interests (Conveyancing Act, 1882, s. 10); and the removal of the restraint on anticipation in the case of the separate estates of married women (Conveyancing Act, 1881, s. 39).

Secondly, by the Settled Land Act, 1882 (*l*), it has been provided as follows :—

"Settled land" shall be land subject to a settlement, the state of facts when the settlement took effect being regarded ; and "settlement" shall be any deed, will, or other instrument (or number of instruments) whether dated before or after (or partly before and partly after) the 1st day of January, 1883 (the date of the commencement of the Act), under which land stands limited to persons in succession,—a remainder or reversion not disposed of by the settlement, being for the purposes of the Act deemed to be an estate under the settlement (*m*) ; and land to which an infant is entitled in fee simple, or for other the whole estate, being deemed settled land (*n*).

The tenant for life under the settlement shall have the powers in and by the Act expressly given to him ; and the phrase "tenant for life" is to include for this purpose not merely the person entitled beneficially for his life (whether subject to any incumbrance or not) to the possession or to the receipt of the rents and profits of the land, but also two or more persons entitled as co-tenants for life to such possession or receipt (*o*), and also the following persons (when entitled to such possession or receipt), that is to say, persons entitled to a fee-simple defeasible, to a base fee, to an estate for years (not being a lease at a rent) determinable with life, to an estate *pur*

(*l*) 45 & 46 Vict. c. 38, amended by the Settled Land Act, 1884 (47 & 48 Vict. c. 18) ; the Settled Land Act, 1887 (50 & 51 Vict. c. 30) ; the Settled Land Act, 1889 (52 & 53 Vict. c. 36 ; sect. 2 of the 52 & 53 Vict. c. 30 (Board of Agriculture Act, 1889) ; sect. 74, sub-s. (1), of the 53 & 54 Vict. c. 70 (Housing of Working Classes Act, 1890); and the Settled Land Act, 1890 (53 & 54 Vict. c. 69), which last-mentioned Act (sect. 17, as to the appointment and retirement of trustees) has in its turn also been amended by the Trustee Act, 1893 (56 & 57 Vict. c. 53).

(*m*) Act, 1882, s. 2 ; Act 1890, s. 4 ; *In re Tibbit's Settled Estates*, [1897] 2 Ch. 149 ; *In re Keck and Hart*, [1898] 1 Ch. 617 ; *In re Ducane and Nettlefold*, [1898] 2 Ch. 96.

(*n*) Act, 1882, s. 59.

(*o*) *Ibid.* s. 2, sub-s. (6).

autre vie, to a defeasible life estate, to a *pur autre vie* estate, to an estate by the curtesy, and to an estate tail generally (whether the reversion thereon is in the Crown or not), or to an estate tail after possibility of issue extinct; but the phrase "tenant for life" is not to include (even when they are in such possession or receipt as aforesaid) a dowress, or a tenant in tail of lands purchased with moneys provided by parliament in consideration of public services (*p*). An infant entitled in fee-simple or for other the whole estate in the land is a "tenant for life" for the purposes of the Act (*q*); and during his infancy (if a male), or during her infancy and discoverture (if a female), the trustees of the settlement (and failing any, the nominees of the court) are to act for him or her (*r*). A married woman (being or being deemed a tenant for life), as regards her estate not being separate, acts with her husband (*s*), and as regards her separate estate, acts by herself as a *feme sole*, and is not (for any of the purposes of the Act) restrained by even an express restraint on anticipation (*t*). A lunatic so found by inquisition (being or being deemed a tenant for life), acts by his or her committee with the sanction of the Lord Chancellor or Lords Justices sitting in lunacy (*u*); but a lunatic not so found cannot so act (save for the purposes of leases) (*v*), the Lunacy Act, 1890, sects. 116, 120, 128, being inapplicable (save as regards *leases*) for any of the purposes of the Settled Land Acts.

The tenant for life (in the extended sense of that word, as above expressed) may exercise the following powers:—

(A.) As regards absolute alienations of the settled land:

(*p*) 45 & 46 Vict. c. 38, s. 58: *In re Clitheroe Estate*, 28 Ch. Div. 378; 31 Ch. Div. 135; *In re Atkinson*, 30 Ch. Div. 605; 31 Ch. Div. 577; *In re Strangways*, 34 Ch. Div. 423.

(*q*) Sect. 59.

(*r*) Sect. 60; *In re Countess of Dudley's Contract*, 35 Ch. Div. 338.

(*s*) Sect. 61.

(*t*) *Ibid.*

(*u*) Sect. 62: *Re Martha Baggs*, [1894] 2 Ch. 416, n.

(*v*) *In re Salt*, [1896] 1 Ch. 117.

A power to sell the settled land or any part thereof;

A power to enfranchise antient freehold lands by selling the seignory thereof, or customary freeholds or copyhold lands, by selling the freehold and inheritance thereof, with or without the mines and minerals;

A power to exchange the settled land or any part thereof; and

A power to concur in making partition of the settled land (*x*).

And upon any sale (*y*), or exchange, or partition (*z*), easements may be granted or given or taken, as the case may require.

(B.) As regards leases of the settled land:

A power to make building (including repairing) leases for ninety-nine years;

A power to make mining leases for sixty years; and

A power to make any other lease for twenty-one years,—and in any of these three cases, either with or without impeachment of waste; and either of the settled land or of any part thereof; or of any easement over it (*a*);

A power to accept surrenders of leases, and either in respect of the whole land leased or of any part thereof, or in respect of the mines and minerals only comprised therein (*b*);

A power (when the tenant for life is the lord of a manor) to grant licences to the copyholders to demise their copyhold lands,—the licence being for such periods only as the lease (in the case of freehold lands) might under the Act have been made for (*c*).

(*x*) 45 & 46 Vict. c. 38, ss. 3, 19.
(*y*) *Ibid.*
(*z*) Act 1890, s. 5.
(*a*) Act 1882, s. 6.
(*b*) Sect. 13.
(*c*) Sect. 14.

(C.) As regards improvements of the settled land :

A power to apply the capital moneys arising under the Act, in or towards the making and efficient construction of any of the twenty different species of improvements specified in the Act (*d*), or which are authorized by the amending Acts (*e*), being improvements on or in connexion with or for the benefit of the settled land,—the improvements specified in the Improvement of Land Act, 1864 (*f*), being as from the 1st January, 1883, extended so as to include all the classes of improvements specified in the Settled Land Act, 1882 (*g*). And

(D.) As regards absolute alienations, leases, and improvements generally :

A power to enter into any contract (or contracts) preliminary thereto, and to vary and rescind the same, in all respects as if he was the absolute fee-simple owner, every such contract enuring for the benefit of the settled land (*h*) ; and also a power to complete by deed the contract of any predecessor in title of the tenant for life (*i*).

And the Act expressly declares and enacts, that the aforesaid powers may not be assigned or released by the tenant for life, and that they shall continue exerciseable by him although he shall have assigned his estate, and that any contract of his not to exercise them shall be void (*k*), —without prejudice to the rights of any assignee for value

(*d*) Act 1882, s. 25.

(*e*) Act 1890, s. 13.

(*f*) 27 & 28 Vict. c. 114, s. 9 ; see also 33 & 34 Vict. c. 56 (Limited Owners' Residences Act, 1870) ; 40 & 41 Vict. c. 31 (Limited Owners' Reservoirs and Water Supply Act, 1877) ; and 60 & 61 Vict. c. 44 (District Councils, Water Supply Facilities, Act, 1897).

(*g*) Act 1882, s. 30.

(*h*) *Ibid.* s. 31.

(*i*) Act 1890, s. 6.

(*k*) Act 1882, s. 50.

of the estate of the tenant for life (*l*) ; but no assignment (unless by way of mortgage to secure a loan) made by a tenant for life in consideration of marriage or by way of family arrangement is to be deemed to constitute the assignee an assignee for value within the meaning of this provision (*m*). The Act further provides, that anything in the settlement excluding, or contriving to exclude, or tending to exclude, the powers given by the Act to the tenant for life, or containing anything designed to induce him to abstain from exercising these powers, shall be void, —so much so that an estate limited to him by way of conditional limitation until he does exercise or attempt to exercise the powers of the Act, or any of them, is discharged of the condition altogether, and is to be deemed an estate to continue for the longest possible time for which it would continue if no such condition was annexed thereto (*n*) ; also, no forfeiture is to result to the tenant for life from the exercise of these powers or any of them (*o*).

The powers conferred by the Act may be exercised from time to time ; and everything incidental to their full and effective execution may be done, as incidentally comprised in the power (*p*). The settlor may also, by the settlement, confer larger powers either on the tenant for life or on the trustees ; and if so, then these powers are to be exerciseable as if the Act had conferred such larger powers, with all incidental consequences (*q*) ; and the powers of the Act are not to interfere with other powers, howsoever given, but are to be cumulative ; and in case of any conflict, the powers of the Act are to prevail (*r*) ; and in case of doubt, the court will give its judicial opinion on summons under the Act (*s*). And even the pendency of an administration

(*l*) Act 1882, s. 50,; *In re Sebright's Settled Estates*, 33 Ch. Div. 429.

(*m*) Act 1890, s. 4.

(*n*) Act 1882, s. 51 ; *Kemp* v. *Haynes*, 37 Ch. D. 306.

(*o*) Act 1881, s. 52.

(*p*) Sect. 55.

(*q*) Sect. 57.

(*r*) Sect. 56 ; *In re Duke of Newcastle*, 24 Ch. Div. 129.

(*s*) Sect. 56.

action does not prevent the tenant for life exercising these powers or any of them,—and he may therefore, in such a case, sell without the sanction of the court (*t*).

For the due execution of the powers conferred upon the tenant for life, the Act has provided that there shall be "*trustees of the settlement*,"—and it defines these trustees as being the trustees with a power of sale, or with a power of consent to or approval of a sale, or (failing any such) the persons who by the settlement are declared to be the trustees thereof for the purposes of the Act ; and (failing any such) the persons who, under sect. 38 of the Act, shall have been appointed by the court (*u*) ; and it having been held that the powers referred to must be powers presently exerciseable, and also exerciseable over the settled land itself which it was proposed to deal with (*x*), it has now been provided (*y*), that the powers may be powers exerciseable over any other land settled to the same uses ; and failing any such powers, the trustees who will in the future have the power of sale, &c., are made the trustees of the settlement.

And a tenant for life, when intending to make a sale, exchange, partition, or lease,—or a mortgage or charge incidental thereto,—is, in general, to give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters containing the notice addressed to the trustees severally, each at his usual or last-known place of abode in the United Kingdom ; and he is, in general, to give the like notice also to the solicitor for the trustees, if any such solicitor be known to the tenant for life, by posting a registered letter containing the notice addressed to the solicitor at his place of business in the United Kingdom ; and every letter (containing any such notice as aforesaid) is to be posted not less than one month before the making by the tenant for life of the

(*t*) *Cardigan* v. *Curzon-Howe*, 30 Ch. Div. 531.

(*u*) Act 1882, s. 2, sub-s. (8).

(*x*) *Wheelwright* v. *Walker*, 23 Ch. D. 752, 761.

(*y*) 53 & 54 Vict. c. 69, s. 16.

sale, exchange, partition, or lease,—or of the mortgage or charge incidental thereto,—or of any contract for the same ; and the Act expressly provides that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement ; but any person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice (*z*). However, as regards such notices, it has been provided by the Settled Land Act, 1884 (*a*), s. 5, to obviate the effect of a contrary decision (*b*), that the notice required by section forty-five of the Act of 1882 of the intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf, the tenant for life furnishing to the trustees (on their request) all reasonable information from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended ; and further, that any trustee by writing under his hand may waive notice either in any particular case or generally, and may accept less than one month's notice. And further, by the Settled Land Act, 1890 (*c*), it has now been provided, as regards leases not exceeding twenty-one years and reserving the best rent and without taking any fine and not exempting the lessee from punishment for waste, that such leases may be made by the tenant for life, without his giving any such notice at all, and although there should be no trustees of the settlement at all.

Moreover, it is not incumbent on the trustees (after or in consequence of receiving such notice, or at all) to do anything by way of interfering with or controlling the proposed exercise by the tenant for life of the powers conferred upon him by the Act, or of any of such powers, —excepting so far as the Act expressly requires the consent or concurrence of the trustees ; and the trustees are

(*z*) Act 1882, s. 45.
(*a*) 47 & 48 Vict. c. 18.
(*b*) *In re Ray's Settled Estates*, 25 Ch. Div. 464.
(*c*) 53 & 54 Vict. c. 69, s. 7.

not to be liable for either giving or refusing their consent, where such consent is required by the Act, to the tenant for life's exercise of his powers (*d*).

A tenant for life, as regard the powers conferred upon him by the Act, is to be deemed to stand in a fiduciary relation to the persons entitled under the settlement, and he must accordingly have regard to their interests (*e*); nevertheless, on any sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with the tenant for life, shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent (as the case may require) that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Act (*f*); and in particular, a statement contained in a lease or in an indorsement thereon signed by the tenant for life, respecting any matter of fact or of calculation under the Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter therein stated (*g*); and the remedy (if any) will, therefore, in all cases, be a personal one against the tenant for life himself (*h*).

And in addition to, and in aid of, the specific provisions contained in the Settled Land Act, 1882, for raising money by mortgage of the settled land when such money is required for the due exercise of the powers of the tenant for life that are hereinbefore mentioned, the Act of 1890 has provided by sect. 11, that whenever money is required for the purpose of discharging an incumbrance on the settled land, the tenant for life may raise the money, together with the costs of the transaction, by mortgage of the settled land in fee simple or for a term of years or otherwise, and the money so raised is declared capital money and applicable accordingly; but an incumbrance,

(*d*) Act 1882, s. 42.
(*e*) Sect. 53.
(*f*) Sect. 54.
(*g*) Sect. 7, sub-s. (5).
(*h*) See *e.g.*, sect. 28, sub-s. (5).

within this section, is not to include any annual sum payable only during a life or lives or during a term of years. The Act of 1890 also provides (by sect. 12), that where a tenant for life is dealing with himself, the trustees of the settlement shall act on his behalf as tenant for life (*i*).

Having stated the provisions of the Act which are of general application, we will now proceed to state the specific provisions of the Act relative to the exercise of the powers of the tenant for life under the Act.

And Firstly, as regards Sales.—Every sale is to be made for the best price that can reasonably be obtained (*k*), but (as regards sites for artizans' dwellings) the price may be less than what would be obtainable if the land were sold for another purpose (*l*). The sale may be in one lot or in several lots, and either by public auction or by private contract (*m*), and with or without a reserve price or power to buy in (*n*), and subject or not subject to any stipulations regarding title, evidence of title, or otherwise (*o*) ; and the sale may be made subject to any restriction regarding the subsequent user of the land, or regarding building thereon, and subject to any reservation of mines and minerals or mining rights (*p*) ; and when the sale is of land subject to any incumbrance, the tenant for life may (with the consent of the incumbrancer) charge the incumbrance on other part of the settled land in exoneration of that sold (*q*). The sale may extend even to the principal mansion house and to the demesnes thereof,—but in that case either the

(*i*) By the 61 & 62 Vict. c. 55, universities and colleges are enabled to exercise (as regards their lands) all the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, the Board of Agriculture being (in effect) the "*trustees of the settlement.*"

(*k*) Act 1882, s. 4, sub-s. (1).

(*l*) 53 & 54 Vict. c. 69, s. 18 ; c. 70, s. 74, sub-s. (1) ; *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*m*) Act 1882, s. 4, sub-s. (3).

(*n*) *Ibid.* sub-s. (4).

(*o*) *Ibid.* sub-s. (5).

(*p*) *Ibid.* sub-s. (6) ; and see sect. 17.

(*q*) Sect 5.

trustees of the settlement must consent to the sale, or an order of the court must be obtained to sanction it (*r*); but a house usually occupied as a farm-house, or a house the site of which, with the lands usually occupied therewith, does not exceed twenty-five acres, is not to be deemed, for the purposes of this restriction on the sale thereof, a principal mansion-house (*s*). Also, on or in connection with a sale (if the same is for building purposes), the tenant for life may, for the benefit of the residents on the settled land or on any part thereof, cause or require any parts of the settled land to be appropriated and laid out for streets or the like, or for gardens or the like; and may also provide, that the parts so appropriated shall be vested in trustees, for securing the continued appropriation thereof to the purposes aforesaid; and he may execute the proper deed in that behalf, and procure the same to be enrolled in the Central Office of the Supreme Court of Judicature.

And in completion of the sale, the tenant for life may, as regards the land sold (including copyhold or customary or leasehold land vested in trustees), or as regards easements and the like, convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner necessary for giving effect to the sale (*t*); and the deed shall accordingly operate to pass the land conveyed,—or the easements, rights, or privileges created,—discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject, of course, to all estates which have priority to the settlement, and to all estates made under powers in the settlement for securing moneys actually raised at the date of the deed, and to all leases or other alienations already made for value and binding on the settlement (*u*); and if the deed comprises

(*r*) Act 1890, s. 10, sub-s. (2); *In re Sebright's Settled Estates*, 33 Ch. Div. 429.

(*s*) *Ibid.* sub-s. (3).

(*t*) Act 1882, s. 20, sub-s. (1).

(*u*) *Ibid.* s. 20, sub-s. (2).

copyhold or customary land, the same is to be entered on the court rolls, and the purchaser is to be admitted thereon without any surrender or other act,—so nevertheless that the lord's fines and the steward's fees be not thereby prejudiced (*x*). And on any grant in fee-simple for building purposes, with the reservation of a perpetual rent issuing out of the land granted, the reservation operates, under the Settled Land Act, 1890 (*y*), to create a rent-charge in fee-simple, and to attach thereto all the remedies for the recovery of a proper rentcharge which are given by the Conveyancing Act, 1881.

Secondly, as regards Exchanges and Partitions.—Every exchange and every partition is to be made for the best consideration in land, or in land and money, that can reasonably be obtained (*z*), or in consideration of (or subject to) the reservation of an undivided share in mines or minerals (*a*) ; and may be made subject or not subject to any stipulation regarding title, evidence of title, or otherwise (*b*), and subject to any restriction regarding the subsequent user of the land, or regarding building thereon, and subject to any reservation of mines and minerals or mining rights (*c*) ; and when the exchange or the partition is of land, or the exchange is for land subject to any incumbrance, the tenant for life may (with the consent of the incumbrancer) charge the incumbrance on other part of the settled land in exoneration of that given in exchange or partition or received in exchange (*d*) ; also, where money is required for equality of exchange or of partition, the tenant for life may raise the same on mortgage of the settled land or of any part thereof, by a mortgage

(*x*) Act 1882, s. 20, sub-s. (3) ; *In re Naylor and Spendla*, 34 Ch. D. 217.

(*y*) 53 & 54 Vict. c. 69, s. 9.

(*z*) Act 1882, s. 4, sub-s. (2) ; and *supra*, p. 524, n. (*l*).

(*a*) Act 1882, s. 17, sub-s. (2).

(*b*) Sect. 4, sub-s. (5).

(*c*) *Ibid.* sub-s. (6) ; and see sect. 17.

(*d*) Sect. 5.

thereof, either in fee simple or for a term of years (*e*). And upon any exchange or partition, and in completion thereof, the tenant for life may, as regards the land given in exchange or on partition (including copyhold or customary or leasehold land vested in trustees), or as regards easements and the like, convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner necessary for giving effect to the exchange or the partition (*f*) ; that is to say, the deed will operate in like manner *mutatis mutandis* as the deed completing a sale by the tenant for life is above expressed to operate under the Act (*g*). Also, under the Settled Land Act, 1890, sect. 5, in such deed, easements may be reserved or granted over the settled land or over any other land ; and easements may be exchanged for easements, or for land ; and may be given or taken on partition.

Thirdly, as regards Enfranchisements.—Every enfranchisement may be made either with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to, or held or enjoyed with, the land enfranchised, or reputed so to be (*h*) ; and, when money is required for enfranchisement, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by a mortgage thereof either in fee simple or for a term of years (*i*).

Fourthly, as regards Leases.—Every lease is to be by deed, and to take effect in possession not later than twelve months after its date (*k*) ; and it is to reserve the best rent that can reasonably be obtained, regard being had to any

(*e*) Act 1882, s. 18.
(*f*) Sect. 20, sub-s. (1).
(*g*) Sect. 20, sub-ss. (2), (3).
(*h*) Sect. 4, sub-s. (7).
(*i*) Sect. 18.
(*k*) Sect. 7, sub-s. (1).

fine taken (which fine is declared to be capital money) (*l*), and to any money laid out, or to be laid out, for the benefit of the settled land, and generally to the circumstances of the case (*m*) ; and it is to contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days (*n*) ; also, a counterpart of every lease is to be executed by the lessee and delivered to the tenant for life, of which execution and delivery the execution of the lease by the tenant for life is sufficient evidence (*o*).

And as regards Building Leases (*p*) :—Every building lease is to be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement for or in connection with building purposes ; and a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or for any less part of the term ; and the building lease may give the lessee an option of purchase, to be exercised within any agreed number of years, not exceeding ten years (*q*). Also, where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner ; save that—(1) The annual rent reserved by any lease is not to be less then ten shillings ; and (2) The total amount of the rents reserved on all leases for the time being granted is not to be less than the total amount of the rent which, in order that the

(*l*) Act 1882, s. 4 ; *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*m*) Sect. 7, sub-s. (2); and *supra*, p. 524, n. (*l*).

(*n*) Sect. 7, sub-s. (3).

(*o*) *Ibid.* sub-s. (4).

(*p*) Sect. 8.

(*q*) 52 & 53 Vict. c. 36 (Settled Land Act, 1889), s. 2.

leases may be in conformity with the Act, ought to be reserved in respect of the whole land for the time being leased ; and (3) The rent reserved by any lease is not to exceed one fifth part of the full annual value of the land comprised in that lease, with the buildings thereon, when completed.

And as regards Mining Leases (*r*) :—(1) The rent may be made to be ascertainable by, or to vary according to, the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land or any other land, or by or according to any facilities given in that behalf, or (under the Act of 1890) (*s*), by or according to the price of the minerals gotten, which price may be ascertained as in that Act prescribed ; and (2) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent according to acreage or quantity in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent, other than the fixed or minimum rent. Also, the lease may be made partly in consideration of the lessee having executed, or agreeing to execute, on the land leased an improvement of the kind authorized by the Act for or in connection with mining purposes.

And generally, as regards both Building and Mining Leases, where it is shown to the court with respect to the district in which any settled land is situate, either—(1) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in the Act, or in perpetuity ; or (2) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term, or on other conditions than the term and conditions specified in

(*r*) 45 & 46 Vict. c. 38, s. 9. (*s*) 53 & 54 Vict. c. 69, s. 8.

that behalf in the Act, or except in perpetuity,—the court may (*t*), if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

Also, on or in connection with any building lease, the tenant for life (*u*) may, for the general benefit of the residents on the settled land, or on any part thereof, make, or procure to be made, the like appropriation of portion of the settled land for streets and the like, and for gardens and the like, as we have above mentioned in connection with a sale effected by the tenant for life, and may (by deed or otherwise) provide also for securing the continued appropriation thereof for such purposes. And a mining lease may be made with or without an exception or reservation of other mines or minerals, and with or without a lease of the settled land or any part thereof, and with or without a grant or reservation of powers of working, and of way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land or any part thereof, or any other land (*x*). But no lease,—either of the principal mansion-house (if any) and of the demesne lands occupied therewith, for building or other purposes, or of the mines and minerals thereunder, or under any part thereof,—may be made by the tenant for life under the leasing powers of the Act, unless he first obtain either the consent thereto of the trustees of the settlement, or else an order of the court authorizing the same (*y*).

(*t*) Act 1882, s. 10.
(*u*) Sect. 16.
(*x*) Sect. 17.
(*y*) Act 1890, s. 10, repealing and re-enacting s. 15 of the Act of 1882.

And upon any lease, and in completion thereof, the tenant for life may, as regards the land leased (including copyhold or customary or leasehold land), and as regards easements or other rights or privileges leased, convey the lands or create the easements by deed for the term of the lease (not exceeding the estate or interest the subject of the settlement), to the extent of giving full effect to the lease ; and the deed will operate in like manner, *mutatis mutandis*, as the deed completing a sale by the tenant for life is above expressed to operate under the Act (*z*).

And as regards the leasing powers generally of a tenant for life, these extend to the making of,—(i) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease which, if made by the predecessor, would have been binding on the successors in title ; and (ii) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land ; and (iii) A lease for confirming, as far as may be, a previous lease, being void or voidable,—but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under the Act, or otherwise (*a*).

Also, the tenant for life may accept, with or without consideration, a surrender of any lease of settled land (*b*), whether made under the Act or not, in respect of the whole land leased or any part thereof (with or without an exception of all or any of the mines and minerals therein), or in respect of mines or minerals ; and on a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned ; and the tenant for life may, of course, thereafter make a new or other lease, and the new or other lease may comprise additional land ; and on accepting such surrender and making such new or other lease, the value of the lessee's

(*z*) Act 1882, s. 20.
(*a*) Sect. 12.
(*b*) Sect. 13.

interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new lease.

And, by way of concluding this exposition of the tenant for life's power of leasing, it should be mentioned that, in the case of mining leases, the Act expressly provides (*c*), that (unless the settlement itself provides to the contrary) there shall be from time to time set apart, as capital money arising under the Act, part of the rent,—and that whether the mines have been already opened or in work or not,—that is to say, where the tenant for life is impeachable for waste, three fourth parts of the rent ; and where he is not impeachable for waste, then one fourth part thereof ; and in either case, the residue only of the rent is to be dealt with as income ; and a similar provision applies to the proceeds of the sale of timber ripe for cutting (*d*) ; but, of course, when the land is sold with the timber thereon, the whole purchase-moneys (although the price of the timber should be ascertained separately, *e.g.*, by valuation) are capital moneys (*e*).

Fifthly, as regards Improvements.—Where improvements are proposed to be made by the tenant for life with capital money arising under the Act, the Act provides as follows (*f*) : that the tenant for life shall, in general, submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon, although the court may dispense with such scheme in a proper case (*g*). And where the capital money to be expended is in the hands of trustees, then, after a scheme

(*c*) Act 1882, s. 11 ; *In re Duke of Newcastle's Estates*, 24 Ch. Div. 129.

(*d*) Sect. 33.

(*e*) *Llewellyn* v. *Williams*, 37 Ch. D. 317.

(*f*) Sect. 26.

(*g*) Act 1890, s. 15.

is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement,—either (1) On a certificate of the Board of Agriculture (*h*), certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is made conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or (2) On a like certificate of a competent engineer or able practical surveyor nominated by the trustees (and approved by the Board or by the court), which certificate is also conclusive as aforesaid; or (3) On an order of the court directing or authorizing the trustees to so apply a specified portion of the capital money. And where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the Board, or of a competent engineer or able practical surveyor approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement; or such moneys may be paid out to the trustees of the settlement to be in like manner applied by them (*i*).

And as regards the subsequent maintenance of the improvements so made, the Act provides (*k*), that the tenant for life, and each of his successors in title, having under the settlement a limited estate or interest only in the settled land, shall,—during such period, if any, as the Board of Agriculture by certificate in any case prescribe,—maintain, and repair, at his own expense, every improvement executed under the Act; and where a building or work in its nature insurable against loss or damage by fire

(*h*) 52 & 53 Vict. c. 30, s. 2.
(*i*) Act 1890, s. 14.
(*k*) Act 1882, s. 28.

is comprised in the improvement, he shall insure and keep insured the same, at his own expense, in such amount, if any, as the Board by certificate in any case prescribe ; and he shall from time to time, if required by the Board, on or without the suggestion of any person having under the settlement any estate or interest in the settled land in possession, remainder, or otherwise, report to the Board the state of every improvement executed under the Act, and the fact and particulars of the fire insurance, if any ; and if the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions aforesaid, or does any act in contravention thereof, any person having under the settlement any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life ; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act. And with a view to enabling the tenant for life not only to execute in the first instance, but also thereafter to maintain in good repair, the improvements aforesaid, the Act provides (*l*), that he may commit waste (not being equitable waste) with impunity, either as regards minerals, timber, or otherwise.

The capital moneys arising under the Act,—that is to say, capital moneys arising in respect of any dealings with the settled land under the powers conferred by the Act on the tenant for life, and which are therefore receivable upon the trusts and for the purposes of the settlement,—are to be paid either to the trustees of the settlement or into court ; and the tenant for life has the option as to which of these modes of payment shall be adopted (*m*). Where the capital moneys are paid to the trustees, there must be two trustees at least (unless the settlement authorizes one trustee to receive such moneys) (*n*) ; and the trustees or (if

(*l*) Act 1882, s. 29.

(*m*) Sect. 22 ; *Cookes* v. *Cookes*, 34 Ch. Div. 498.

(*n*) Sect. 39.

the case is so) the trustee may give an effective receipt for the moneys so paid to them or him (*o*) ; and each trustee is to be answerable for his own receipts only, and not for any loss of capital moneys, even when received by him, unless the loss arises through his own wilful default (*p*) ; and every trustee may also reimburse himself his proper charges and expenses out of the capital moneys (*q*).

Capital moneys arising under the Act will be applicable primarily for the specific purpose (if any) for which they were raised, *e.g.*, to pay for equality of exchange, or to pay the consideration-moneys or expenses on an enfranchisement ; and subject thereto, and to any other payments primarily payable out of the capital moneys, they are to be applied (representing in fact, and being a substitute for, the settled land) in all or some or one of the following ways (*r*), that is to say :

(i) In investment on Government securities,—or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest the trust moneys of the settlement,—or on the securities of the bonds, mort gages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities :

(ii) In the discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land,—or other the whole estate the subject of the settlement,—or of the land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land :

(*o*) Act 1882, s. 40.
(*p*) Sect. 41.
(*q*) Sect. 43.
(*r*) Sect. 21 ; *Clarke* v. *Thornton*, 35 Ch. Div. 307.

(iii) In payment for any improvement authorized by the Act:

(iv) In payment for equality of exchange or partition of settled land:

(v) In the purchase of the seignory of any part of the settled land, being freehold land, or in the purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi) In the purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or for life, or for years determinable on life:

(vii) In the purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase,—and subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land:

(viii) In the purchase, either in fee simple or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix) In payment to any person becoming absolutely entitled to, or empowered to give an absolute discharge for, the capital moneys:

(x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of the Act: and,—

(xi) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder (*s*).

(*s*) *In re Lord Aylesford's Settled Estates*, 32 Ch. Div. 162.

Capital moneys received by the trustees of the settlement are to be invested by them according to the direction of the tenant for life, and failing any such direction, at their (the trustees') own discretion, but with such (if any) consents as the settlement requires (*t*) ; and no investment is to be altered or varied unless with the consent of the tenant for life (*u*) ; capital moneys paid into court are to be invested, or otherwise applied, under an order of the court to be obtained by the tenant for life, or by the trustees (*x*),—or they may be paid out to the trustees to be duly invested by them. The investments, and the moneys until invested, are to be considered as land for all the purposes of alienation or devolution (*y*) ; and the income thereof is to go and be paid as the rents and profits of the settled land would be. And, in particular, when the capital money is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement, or, as the case may be, the court,—and, in the case of the court, on the application of any party interested in that money,—may, notwithstanding anything in the Act, require and cause the same to be laid out, invested, accumulated and paid in such manner as will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be (*z*).

Lands acquired by purchase with capital moneys arising under the Act,—or acquired by exchange or on partition,—are to be settled to, for, and upon the uses, purposes, and trusts of the settlement (*a*) ; and in particular (1) Freehold land is to be conveyed to the uses, on the trusts, and subject

(*t*) Act 1882, s. 22, sub-s. (2).
(*u*) *Ibid.* sub-s. (4); *In re Clitheroe Estate*, 28 Ch. D. 378 ; 31 Ch. Div. 135.
(*x*) Sect. 22, sub-s. (3).
(*y*) Sect. 22, sub-s. (5).
(*z*) Sect. 34.
(*a*) Sect. 24.

to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging; and (2) Copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement, on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as aforesaid,—but so, nevertheless, that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail (male, female, or general), who dies under the age of twenty-one years, but shall on the death of that person under that age go as freehold land conveyed as aforesaid would go.

Regarding heir-looms and personal chattels settled in trust so as to devolve with land until a tenant in tail of the land entitled thereto by purchase (as opposed to descent) is born or attains the age of twenty-one years, the Act provides (*b*), that the tenant for life of the land may (but only with the sanction of the court) sell the heir-looms, or chattels, or any of them; and the sale-proceeds are to be dealt with as capital moneys arising under the Act; or they may be invested in the purchase of other chattels of the like or any other nature, to be settled upon the like trusts as the heir-looms or chattels sold.

In a trader's settlement (as it is called, to distinguish it from a strict settlement), the settled land is usually settled upon trust for sale, and the rents and profits of the land until sale, and the income of the sale-proceeds when invested, are usually given to one or more persons for his, her, or their lives, and the capital moneys are afterwards divisible among the children of the marriage and their

(*b*) Act 1882, s. 37; *Fane* v. *Fane*, 2 Ch. Div. 711; *Re Carnac*, 30 Ch. Div. 136; *In re Duke of Marlborough's Settlement*, 30 Ch. Div. 127; 32 Ch. Div. 1, 616; *Earl Radnor's Will*, 45 Ch. D. 402.

descendants ; and to such a settlement, all the beneficial provisions of the Settled Land Acts are applicable, *mutatis mutandis* (*c*). It is obvious, however, that such land is for all purposes of transmission and devolution merely personal estate ; *consequently, the trust funds are not to be invested in the purchase of land*, unless there is an express provision in the settlement authorizing such an investment (*d*) ; and there is also this great distinction between strict settlements and the traders' settlements now under consideration, namely, that by the provisions of the Settled Land Act, 1884 (*e*), a tenant for life under a trader's settlement can only exercise, under the sanction of the court, the powers conferred upon the tenant for life under a strict settlement.

The powers of selling and of leasing settled land which are conferred by the Settled Land Acts, 1882 to 1890, are of a character so exhaustive and flexible, as to have almost superseded the like powers which were conferred by the Leases and Sales of Settled Estates Act, 1877 (*f*) ; and a very brief account of the provisions of the last-mentioned Act will therefore here suffice. And firstly, as regards the powers which are exerciseable without the sanction of the court,—and which powers, in the case of settled estates, are conferred only where the settlement was made (*g*) after the 1st November, 1856, the date of the repealed Act, 19 & 20 Vict. c. 120 : By sect. 46, the following limited owners, when entitled in possession,—that is to say :—a tenant for life ; a tenant *pur autre vie* ; a tenant for years determinable on life ; a tenant in tail after possibility of issue extinct ; a tenant in tail ; a tenant by the curtesy ; a dowress ; and a husband entitled during the coverture and in right of his wife,—may lease for twenty-one years (*h*) any part of the land (other than the mansion house and the demesne lands),—the lease being in possession (or taking effect in possession within a year from the making thereof),

(*c*) Act 1882, s. 63.
(*d*) *Ibid.* sub-s. (2).
(*e*) 47 & 48 Vict. c. 18, ss. 6, 7.
(*f*) 40 & 41 Vict. c. 18.
(*g*) *Ibid.* s. 57.
(*h*) Or, in Ireland, 35 years.

and being by deed, and reserving the best obtainable rent, and being without any fine, and containing a covenant for the due payment of the rent and other proper and usual covenants (*i*), and containing also a condition of re-entry on non-payment of the rent for twenty-eight days ; and the lessee is not to be unimpeachable for waste ; and a counterpart of the lease is to be executed.

And secondly, as regards the powers which are exercise-able only with the sanction of the court,—By sect. 4, the court may authorise any lease of the settled estate,—or any grant of easements to be exercised over the same,—and whether the lease or grant involves waste or not,—the lease or grant being in possession, or taking effect in possession within one year from the making thereof ; and the term being twenty-one years (*k*) for an agricultural or occupation lease, forty years for a mining lease or for a lease of watermills or waterleaves or wayleaves, sixty years for a repairing lease, and ninety-nine years for a building lease ; and the rent to be reserved is to be the best obtainable rent, and to be without fine,—although in the case of a mining lease, a repairing lease, and a building lease, a peppercorn rent (or any smaller rent than the rent to become ultimately payable) may be reserved during the first five years ; and the lease is to be by deed, and is to contain a condition for re-entry on non-payment of the rent for twenty-eight days ; and it will contain also such other covenants and conditions as the court shall require ; and the lessee is to execute a counterpart thereof : and where the court is satisfied, the lease (not being an agricultural one) may be made for any term of years which the court may sanction. And note, that the power so given, extends (by sect. 8) to preliminary contracts for leases ; and the court may (by sect. 10) either approve particular leases, or grant general powers of leasing.

By sect. 16, the court may authorise the sale of the settled land,—or of any timber (not being ornamental

(*i*) *Davies* v. *Davies*, 38 Ch. D. 499.

(*k*) Or, in Ireland, 35 years.

timber) growing thereon ; and (by sect. 18) upon the sale of any building land, the purchase moneys (or any part thereof) may be in the form of a rent reserved ; and (by sect. 19), upon any sale whatever, any earth, stone, coal, or mineral may be excepted, and any mining privileges may be reserved.

The application to the court for its sanction to the exercise of the power of sale or of leasing is to be by petition (sect. 23),—the petitioner being the person (or his assignee) entitled in possession for his life, or for an estate for years determinable with his life, or for any greater estate (sect 23),—the remainderman (or reversioner) in general consenting to the application (sect. 24), although the court may dispense with that consent (sect. 25).

On any mining lease, the tenant for life is (by sect. 4) to be entitled to one-fourth part only of the rent reserved (when he is impeachable for waste), and to three-fourth parts only (when he is unimpeachable for waste,—and the residue of the rent is to be set aside as capital ; and (by sect. 34) the rent so set aside as capital, and also all purchase moneys received on any sale,—being first paid into court, or else to trustees approved by the court,—are to be applied in the purchase or redemption of the land tax, or in the discharge or redemption of incumbrances on the settled land, or in the purchase of other lands to be settled upon the like limitations,—unless or until the same is paid to the person becoming absolutely entitled thereto.

CHAPTER XXV.

OF REGISTRATION OF TITLE TO LAND.

To modern conveyances, it has been commonly imputed as a defect, that they are not attended with sufficient notoriety (*a*) ; and it is undoubtedly true, that modern conveyances have been for the most part private, only a very few of them requiring enrolment, and none of them having, by the common law, required registration. However, for the county of Middlesex and for the county of York, registration was latterly made essential,—in the county of Middlesex, by the 7 Anne, c. 20, which statute (excepting as regards a few sections thereof) is still in force, and has been recently amended by the Land Registry (Middlesex Deeds) Act, 1891 (*b*), whereby the Middlesex Registry has been amalgamated with the Land Registry hereinafter mentioned ; and in the county of York, by the 2 & 3 Anne, c. 4, and 6 Anne, c. 20 (for the West Riding of that county), and by the 6 Anne, c. 62 (for the East Riding), and by the 8 Geo. II. c. 6 (for the North Riding), all which four last-mentioned statutes have been recently repealed, and their provisions, with certain amplifications and modifications, re-enacted, promiscuously for the whole county, in and by the Yorkshire Registries Act, 1884 (*c*). And the Acts referred to have provided, that any deed, conveyance, or devise which shall affect land of freehold tenure, situate in either of those two counties (but not including leases at rack rent, or for twenty-one years or under, *where the actual possession goes*

(*a*) 2 Bl. Com. p. 342.
(*b*) 54 & 55 Vict. c. 64.
(*c*) 47 & 48 Vict. c. 54, amended by the 48 Vict. c. 19, and the 48 & 49 Vict. c. 26.

along with them), shall be fraudulent and *void* against a subsequent purchaser or mortgagee, unless a memorial thereof shall have been *registered* in such manner and within such period as the Acts direct. But, in fact, such unregistered deeds were never *void*, if the subsequent purchaser or mortgagee had notice of them (*d*) ; and by the Vendor and Purchaser Act, 1874 (*e*), s. 8, unregistered wills were made good *in favour of a purchaser from the devisee*, provided that he registered his purchase deed before any purporting purchaser from the heir-at-law had registered his purchase deed,—although, now, but as regards lands in Yorkshire only, a document is really and truly *void* if unregistered, whether the subsequent purchaser has notice of it or not, *unless in cases of actual fraud* (*f*) ; and the Registry Acts for Yorkshire contain also provisions for registering titles which are not evidenced by any document, *e.g.*, intestacies, liens, and equitable mortgages affected by the mere deposit of title deeds.

But, excepting as regards Middlesex and Yorkshire,—and (we may add) some parts of Bedfordshire (*g*), the policy of the registration of *deeds* has never been adopted in England,—opinions having been very divided as to its utility (*h*) ; and the registration of the *title* to land has never been compulsory in any part of England,—although (as we shall presently see) it is now, by the Land Transfer Act, 1897 (*i*), made compulsory in the county of London (or in certain parts of that county) ; and the intention is that it shall in due course become compulsory over the whole of England, being in the meantime optional with the party.

In the year 1862, an office called the office of "Land Registry" was established by the 25 & 26 Vict. c. 53 ; and

(*d*) *L'Neve* v. *L'Neve*, 1 Ves. sen. 64 ; *Tunstall* v. *Trappes*, 3 Sim. 301 ; *Bradley* v. *Riches*, 9 Ch. Div. 212.

(*e*) 37 & 38 Vict c. 78.

(*f*) 47 & 48 Vict. c. 54, s. 14 ; *Battison* v. *Hobson*, [1896] 2 Ch. 403.

(*g*) 15 Car. 2, c. 17, s. 8.

(*h*) 2 Bl. Com. 343.

(*i*) 60 & 61 Vict. c. 65.

by that statute provision was made for the registration of an indefeasible title to lands, when the title (on the prescribed investigation thereof) was found to be sufficiently good ; and a greater use has been made of the office of Land Registry since the coming into operation of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87) whereby the office was re-constituted ; and the work of the office was further increased upon the coming into operation of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51) ; and the work of the office bids fair to be now further considerably increased under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65).

The Land Charges Registration and Searches Act, 1888 (the provisions of which Act it is more convenient to state before proceeding to the Land Transfer Acts, 1875, 1897) has enacted as follows : Firstly, as regards " Writs and Orders affecting Land," that there shall be established and kept at the office of Land Registry a special register, called " the register of writs and orders affecting land " ; and that in such register there may be registered any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment statute or recognizance, or any order appointing a receiver or sequestrator of land (sect. 5),—the entry being made in the name of the person whose land is affected, and the registration enduring for five years, and being in lieu of the registration of such writ or order in the central office ; and any such writ or order, unless registered, is void against a purchaser for value, mortgagee, or lessee of the land (sect. 6), existing registrations in the central office (during the remainder of their currency), and *lites pendentes* duly registered at the central office, being excepted ; but (under a later statute (*m*), the registration of any such writ or order may be vacated under an order of the court to be obtained for the purpose. And the Act of 1888, has enacted, Secondly, as regards " Deeds

(*m*) 53 & 54 Vict. c. 19, s. 19.

of Arrangement,"—that there shall be kept at the office of Land Registry a special register, called "the register of deeds of arrangement"; and that deeds of arrangement may be registered therein in the name of the debtor (sect. 7), on the application either of the trustee of the deed, or of any creditor taking the benefit of the deed (sect. 8); and any such deed, unless registered, is void against a purchaser for value, mortgagee, or lessee of the land; and this registration is additional to, and not in substitution for, the registration required by the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57). Thirdly and Lastly, the Act of 1888 has enacted, as regards "Land Charges" (*n*),—that there shall be kept at the office of Land Registry a special register, called "the register of land charges"; and that land charges may be registered therein—the registration (in the case of freehold lands) being made in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge, and (in the case of copyhold lands) being made in the name of the tenant on the court rolls at that time, and also (if it should so happen) in the name of the person who (being entitled only to a lease for life or lives, at a rent, or for a term of years) has procured the rent-charge to be created (sect. 10); and the Act expressly provides (by sect. 12), that every land charge created after the 31st December, 1888, which shall not have been duly registered under the Act, shall be void against a purchaser for value, mortgagee, or lessee of the land. Also (by

(*n*) "*Land charge*" is defined by the Act (sect. 4) as meaning a rent or annuity, or principal moneys payable by instalments or otherwise, with or without interest, charged (otherwise than by deed) upon land, under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges, and expenses incurred by him, under such Act; or the moneys advanced by him for repaying such moneys, or such costs, charges, and expenses; also, a charge under sect. 35 of the Land Drainage Act, 1861, or under sect. 29 of the Agricultural Holdings Act, 1883: but not a "rate" or "scot."

sect. 13), a land charge created before that day is required to be registered within a year after the first assignment thereof which shall be executed after the 31st December, 1888.

The Land Transfer Acts, 1875 and 1897, remain to be considered. And firstly, these Acts (the provisions thereof regarding registration, and which provisions alone we are now considering) apply to both freehold and leasehold lands; but the Acts do not apply to copyhold lands (whether copyhold lands properly so called or customary freehold lands),—unless and until they have been enfranchised (*o*).

The Acts provide for the registration of the *title*; and the title to be registered is (in the case of *freehold* lands) the fee simple title, and (in the case of *leasehold* lands) is the title for the whole estate created by the lease; and such title may (in either case) be either an *absolute* title, a *qualified* title, or a *possessory* title, according to the distinctions to be presently mentioned (*p*).

Under the Act of 1897 settled land (that is to say, the *title* to settled land) may also be registered, the registration in that case being either in the name of the tenant for life, or in the names of the trustees of the settlement, or (when there is any overriding power) in the names of the donees of that power, the proper inhibitions and restrictions being in each case entered on the register (*q*).

By the Act of 1897, s. 20, it is made competent to the Queen by Order in Council to declare, as respects any county or part of a county mentioned or defined in the order, that on and after the day in that behalf specified in the order registration shall be "*compulsory on sale*" of the land; and thereupon no purchaser shall, under his purchase deed executed after that day, acquire the legal estate in the land purchased (being land situate within the county or part of the county mentioned in the order).

(*o*) *The Queen* v. *Middlesex Registrar*, 21 Q. B. D. 555.

(*p*) Act 1875, s. 7.

(*q*) Sect. 6.

unless and until he is registered as the proprietor of the land,—registration with a *possessory* title being, however, sufficient to satisfy the last-mentioned requirement. And pursuant to these provisions of that section, the Queen has been pleased (by Order in Council dated the 18th July, 1898) to declare, as regards the county of London, that registration of the title to land shall be compulsory on a sale in the several portions of the county which are mentioned in the first column of the schedule to the order, on and after the respective days mentioned in the second column of the same schedule (*r*).

However, nothing in the Act (or, of course, in the Order in Council) is to render compulsory the registration of title, when the title is to any of the following descriptions of land, that is to say:—(1) Incorporeal hereditaments; (2) Mines and minerals owned separately from the surface; (3) Leases having less than forty years to run or two lives yet to fall in; (4) An undivided share in land; (5) Freehold lands intermixed with and indistinguishable from lands of any other tenure; and (6) Corporeal hereditaments which are parcel of a manor and which are included in a sale of the manor as such (that is to say, copyhold hereditaments, including customary freeholds but not ancient freeholds); but as regards undivided

(*r*) The schedule is as follows:—

Portions of the County.	Days.
Hampstead, Saint Pancras, Saint Marylebone, and St. George's, Hanover Square,—the parishes of:	1st November, 1898 (now 1st January, 1899).
Shoreditch, Bethnal Green, Mile End Old Town, Wapping, St. George's in the East, Shadwell, Ratcliff, Limehouse, Bow, Bromley, and Poplar,—the parishes of:	1st March, 1899.
The remainder of the county (not including the city) of London, north of the centre line of the River Thames (except North Woolwich).	1st October, 1899.
The remainder of the county (not including the city) of London, the city of London - -	1st January, 1900. 1st July, 1900.

shares, where *all* the undivided owners sell concurrently, the conveyance on sale would, *semble*, fall within the compulsory provisions of the Act; and as regards mines and minerals, where these are shown to belong to the surface-owner, the registration of his title will (by means of a special note to be added by the Registrar) show that,—as it will also do, in any case in which the mines have been worked or otherwise opened, and have been enjoyed according to the title, and no other or adverse title thereto is suggested; and on the other hand, where the ownership of the mines and minerals is shown (or is admitted) to be in another or others, the Registrar will (by means of such special note as aforesaid) show that they are not included in the registration (*s*).

The application to be put on the register, either in the applicant's own name or in the name or names of his nominee or nominees, may be made (in the case of *freehold* lands) by any person,—(1) Who has contracted to buy for his own benefit an estate in fee simple (subject or not to incumbrances); or (2) Who is entitled for his own benefit, at law or in equity, to such an estate; or (3) Who is capable of disposing for his own benefit by way of sale of such an estate,—but in the case first supposed, the applicant must have obtained the consent of the vendor to the application being made. And (in the case of *leasehold* lands) the application may be made by any person,—(1) Who has contracted to buy the leaseholds; or (2) Who is entitled thereto for his own benefit either at law or in equity; or (3) Who is capable of disposing of the same for his own benefit by way of sale,—but in the case first supposed, (just as in the like case with freeholds,) the applicant must have obtained the consent of the vendor to the application being made (*t*).

And for regulating the mode of the application and the procedure thereon, and generally for carrying into effect

(*s*) Act 1875, s. 69; General Rule 67, Act 1897.

(*t*) Act 1875, s. 11.

the compulsory and other provisions of the Acts, general rules (dated the 2nd August, 1898) have been made under sect. 111 of the Act of 1875, and sect. 22 of the Act of 1897. And, under these rules (which repeal all the prior rules), it is provided, that the Land Register shall consist of three registers,—viz., (1) the Property Register; (2) the Proprietorship Register; and (3) the Charges Register; and the title to each registered property is to be distinguished upon the register by a number; and the property itself is to be defined by means of a plan (to be filed in the Land Registry), and the description of the property in the Property Register is to refer to such plan: And there is also to be kept in the Land Registry (besides an Index of Proprietors' Names and an Index or List of Pending Applications for Registration) an Index Map; and upon such Index Map, each registered property is to be marked with its original register number, and is also to be defined by a distinctive colour. And note, that a separate Index Map is to be kept for leasehold titles,—leaseholds (where situate within the compulsory area) being brought within the compulsory provisions of the Act by the General Rules 58—60. By which rules it is provided, that,—as regards all existing leases which at the date of the execution of the "*assignment on sale*" thereof (being an assignment dated subsequently to the day specified in the Order in Council) have at the least forty years still to run or two lives yet to fall in; and as regards also all grants of leases (or of underleases) for a term of forty years or more or for two or more lives (being grants executed after the specified day),—the assignment or grant shall operate as an agreement only, and shall not pass the legal estate, unless and until the assignee or grantee is registered as the proprietor of the land,—registration with a *possessory* title being, however, sufficient to satisfy the last-mentioned requirement.

And where the application to be put on the register is an application for registration with an *absolute* title, there

is to be first a laborious investigation of the title,—just as under the present practice on a sale of lands; and persons objecting to the registration are invited by advertisements to come in and object before the Registrar; and it is only when the Registrar is fully satisfied as to the goodness of the title, that the applicant will be registered with an absolute title. And if upon any such application, the Registrar is not satisfied of the goodness of the title, then the applicant (if agreeable to be so registered) will be registered with a *qualified* title, that is to say, with a title which is absolute save for any estate right or interest which the Registrar excepts on the registration, and all which excepted estates rights or interests are to be entered on the register. On the other hand, when the application is (and in most cases it will be) for registration with a *possessory* title only, there is no investigation of the title at all, but the applicant merely leaves his conveyance on sale (in the case of freeholds) or his assignment on sale or his lease (in the case of leaseholds), or else makes a statutory declaration of his title, furnishing in either case such a description of the parcels as will enable the property to be identified on the Ordnance Map.

And the registration is completed,—by entering in the Property Register a description of the parcels with a reference to the filed plan thereof; and by entering on the Proprietorship Register a statement as to whether the title is absolute, or is qualified, or is possessory, together with the name, address and description of the proprietor, and any (if there should be any) restrictions, inhibitions, or cautions affecting his right to dispose of the property; and by entering in the Charges Register a note of any (if there should be any) incumbrances prior to registration, and a note of such other charges, &c., &c., as (under the Acts and rules) ought to be entered therein.

And on the completion of the registration, the registered proprietor receives from the Registrar a *Land Certificate* (in the case of freeholds; and also, *semble*, in the case of

leaseholds) ; and receives from the registrar (in the case of leaseholds) an office copy of his registered lease,—the land certificate stating whether the title is absolute or qualified or is possessory only.

And once the registration of the title has been so completed as aforesaid (being the first registration of the title), the Acts provide, as regards *freeholds* (*u*), that there shall vest in the registered proprietor (when he is registered with an absolute title) an estate in fee simple, free from all other estates and interests (including those of the Crown), but subject to certain qualifications specified in the Acts,—that is to say, subject (1) To any incumbrances entered on the register ; (2) To such liabilities and incidents of tenure as are by the Acts declared not to be incumbrances ; and (3) To any unregistered estates or interests derived under the registered proprietor ; and that there shall vest in the registered proprietor (where he is registered with a possessory title) the like fee simple estate, subject to the like qualifications, and subject also to any estate right or interest adverse to (or in derogation of) the registered title : and the Acts provide, as regards *leaseholds* (*x*), that there shall vest in the first registered proprietor (where he is registered with an absolute title) the possession of the land for all the estate created by the lease, free from all other estates and interests (including those of the Crown), but subject to certain qualifications specified in the Acts,—that is to say, subject (1) To all covenants (express and implied) and obligations and liabilities incident to the estate ; (2) To any incumbrances entered on the register ; (3) To such liabilities and incidents of tenure as are by the Acts declared not to be incumbrances (*u*) ; and (4) To any unregistered estates or interests derived under the registered proprietor ; and that there shall vest in the registered proprietor (where he is registered with a possessory title only), the like possession of the land for all the

(*u*) Act 1875, ss. 7, 8, 18.
(*x*) *Ibid.* ss. 13, 14, 18 ; General Rule 47 ; Act 1897, s. 18, and Schedule.

estate created by the lease, subject to the like qualifications, and subject also to any estate right or interest adverse to (or in derogation of) the registered title (*y*). And, of course, as regards both freeholds and leaseholds, when the title registered is a *qualified* title, the estate which by registration is vested in the first registered proprietor will be subject also to the estates which were excepted by the Registrar upon the first registration.

When the title to land has once been registered under the Acts, it may be again taken off the register, excepting as regards land situate within any compulsory area (*z*); but while and so long as the title remains on the register, the land, when situate within Middlesex or Yorkshire, is exempt from the necessity of registration under the Middlesex and Yorkshire Registry Acts before mentioned (*a*).

Also, as against the registered proprietor, adverse possession will not confer any title to the land (*b*); but where the registration was for a *possessory* title only, and the adverse possession had already commenced at the date of the first registration, that adverse possession may afterwards mature (equally as in the case of unregistered land) (*c*): and even where the first registration was for an *absolute* title, an adverse possession which has so already commenced as aforesaid, and which has afterwards matured as aforesaid may (upon a rectification of the register by the Court) become effective even against the first registered proprietor or any subsequent registered proprietor other than and except a registered proprietor *for value* (*d*).

The first registered proprietor will (as already stated) continue subject (unless where and so far as the contrary is expressed on the register) to all those liabilities and incidents of tenure affecting his land which are by the

(*y*) Act 1875, s. 14.
(*z*) Act 1887, s. 17 (1).
(*a*) *Ibid.* s. 17 (3).
(*b*) *Ibid.* s. 12.
(*c*) *Ibid.* s. 12.
(*d*) *Ibid.* s. 12.

Acts declared *not to be incumbrances*; and the liabilities and incidents of tenure to which the land will so continue subject are (briefly) the following, that is to say:—Liability (by reason of tenure) to repair highways, chancels, sea and river walls, and embankments, &c.; quit rents, crown rents, and the like; heriots and customary rights, and public rights, and the like; estate duty, succession duty, land tax, tithe rentcharge, and the like; mining estates, and rights or powers outstanding at the date of the first registration; franchises, manorial rights, and the like; and certain leases or agreements for leases and other tenancies (*e*). It is to be noted, however, that under the Act of 1897, where the liabilities and incidents aforesaid appear to the Registrar on the occasion of the first registration of the title to affect the land, they are to be noted by him on the register; and a right of re-entry or right of reverter may also be so noted by him, if it appear at the time of the first registration to affect the land. And, of course, any subsequent registered proprietor will take subject to all the liabilities and incidents of tenure aforesaid to which the first registered proprietor continues subject. But as regards the unregistered estates and interests to which, as being derived under the first registered proprietor, he continues subject (as already stated), the subsequent registered proprietor does not take subject thereto, where he is entitled *for value*, and is not a mere volunteer (*f*).

A registered proprietor may, by registered instrument, create a mortgage of the registered land, the mortgagee obtaining from the Registrar a certificate of the charge; and the registered proprietor of the land may also sell it, or otherwise alienate it; and, of course, he may (if entitled in fee simple for his own benefit) devise the land,—but (if not so entitled) his devise would not affect the beneficial ownership; and whether entitled beneficially or not, the

(*e*) Act 1875, s. 18; Act 1897, s. 18, and First Schedule.

(*f*) Act 1875, ss. 30—33 (freeholds); ss. 35, 38 (leaseholds).

registered land (just like unregistered land) will now vest in his real representative (*g*).

A registered proprietor may also deal with the land by an unregistered instrument,—for the purpose of creating any estate or interest which his own beneficial estate entitles him to create (*h*) ; and he may also create a mortgage by deposit, depositing the land certificate or office copy of the registered lease (*i*),—save when he is the incumbent of a benefice (*k*) ; and the registered proprietor of a charge (that is to say, a registered mortgagee) may create a sub-mortgage by deposit, depositing his certificate of charge.

But the principal intention of the Acts is, that (so far as regards sales and mortgages, and other dealings *inter vivos*), registered dispositions only shall be used ; and the general rules (in the First Schedule thereto) provide short forms of conveyance on sale (*i.e.*, of transfer), and also short forms of mortgage (*i.e.*, of charge), and of sub-mortgage (*i.e.*, of sub-charge), and short forms for the transfer and discharge of mortgages (*i.e.*, of charges) (*l*) ; and the forms so provided (with only the necessary modifications) are directed to be used (*m*). And for the purpose of introducing the implied covenants under the Conveyancing Act, 1881, the registered proprietor may, in the form, express, that he is transferring or charging as beneficial owner, or as settlor, or as trustee, or as mortgagee, or otherwise as the case may require (*n*) ; also, in every charge, there are implied (unless the charge itself expressly excludes them) covenants on the part of the mortgagee to pay the principal money with the interest thereon at the appointed time, and to pay the interest half-yearly after the appointed time (*o*) ; and (where the mortgage is of leaseholds) a covenant on the part of the mortgagee to pay the rent and to observe the

(*g*) Act 1897, s. 1.
(*h*) Act 1875, s. 49.
(*i*) Act 1897, s. 8.
(*k*) *Ibid.* s. 15 (1).
(*l*) Rules 79—127.
(*m*) Rule 146.
(*n*) Rule 148.
(*o*) Act 1875, s. 23.

covenants, &c., of the lease (*p*). There are also forms provided for exchanges and partitions (*q*) ; and forms for conveyance in mortmain, and to charitable uses (*r*) ; also, forms for the conveyance of land subject to conditions restrictive as to the user of the land (*s*) ; and the forms so provided are (by force of the Acts and the rules) made equally efficacious with the longer and more usual forms of conveyance, or of mortgage and re-conveyance,—*e.g.*, a discharge of mortgage in the form provided, where the mortgage is to a building society or the like, has the same effect as the statutory receipt usually endorsed on the mortgage (*t*) ; also, in an assignment of leaseholds to a purchaser, where the transfer is in the prescribed form, the covenants on the part of the vendor and purchaser respectively as to the rents and covenants and conditions of the lease which are inserted in an ordinary assignment of leaseholds are implied (*u*) ; and in a mortgage in the prescribed form, all the usual powers of a mortgagee for the realization of his security are implied,—unless where and so far as they are expressly excluded by the prescribed form ; *e.g.*, the power to enter, to foreclose, to sell, and the like (*x*) ; also, a transfer on sale made by the registered proprietor of a charge is to operate as a sale and conveyance in exercise of the implied power of sale (*y*).

The rules also provide for the registration of the real representative, in the case of a transmission of the title by the death of the registered proprietor (*z*),—and for the subsequent registration in his place of the beneficial devisee of the land (*a*), or of any legatee to whom (under the provisions of the Act of 1897) the lands have been appropriated by the real representative (*b*) ; and also for

(*p*) Act, 1875, s. 24.
(*q*) Rules 103, 105.
(*r*) Rules 95, 96.
(*s*) Rule 102.
(*t*) Rule 113.
(*u*) Act 1875, s. 39.
(*x*) Act 1875, ss. 25—27 ; Act 1897, s. 9 (2).
(*y*) Act 1897, s. 9 (1).
(*z*) Rule 128.
(*a*) Rule 130.
(*b*) Rule 130.

the registration of the Official Receiver, in the case of a transmission in bankruptcy, and of the trustee for the creditors in the case of a transmission in bankruptcy or liquidation (*c*).

And as regards the conveyance on any sale by the registered proprietor of the lands, the prescribed form of transfer passes to the purchaser the whole registered title of the vendor (whether such title be absolute, or qualified, or possessory),—subject only to the incumbrances (if any) entered on the register, and to the liabilities and incidents of tenure which by the Acts are declared not to be incumbrances ; and (when the title is qualified) subject also, of course, to the estates and interests which are excepted on the register ; and (when the title is possessory) subject, of course, to any adverse estate right or interest which was subsisting at the date of the first registration of the title (*d*) ; and (when the lands sold are leasehold lands) subject, of course, to the rents and covenants, &c., of the lease (*e*). And similarly, upon the transfer of a mortgage, if the prescribed form of transfer is used, the transferee takes the title of his transferor, according as such title is absolute, or is qualified, or is possessory (*f*),—and where the transfer is for value, he is not affected by any irregularity in the original mortgage (*g*).

Consequently, the purchaser of registered land "shall not" (*h*) (and a mortgagee of such land "need not") require any evidence of the title of his vendor (or mortgagor), other than and except (1) what may be obtained from an inspection of the register, coupled with a statutory declaration as to the continued existence or otherwise of the liabilities and incidents of tenure which are by the Acts declared not to be incumbrances, and (2) an abstract dealing with

(*c*) Rules 138—145.
(*d*) Act 1875, ss. 30—32.
(*e*) Act 1875, s. 35.
(*f*) Act 1875, ss. 22, 40 ; Act 1897, s. 18, First Schedule.
(*g*) Act 1897, s. 18, First Schedule.
(*h*) Act 1897, s. 16 (1).

the incumbrances (if any) which were entered on the register on the first registration of the land as subsisting at the date of such first registration ; and (where the title is qualified) (3) an abstract dealing with the estates which were then excepted on the register ; or (where the title is possessory) (4) an abstract dealing with the title to the land as subsisting at the date of the first registration of the land. Also, the purchaser need not require the vendor to enter into (and the vendor is not compellable to give) (*i*) any covenants for title, in the case of a registered absolute title; and his covenants for title (in the case of a registered qualified or possessory title) will be limited to the estates and interests which are left unaffected by the registration.

And for the protection of unregistered estates interests and rights (including, in the case of settled lands, the estates in remainder), the Acts have provided for notices, cautions, inhibitions, and restrictions being entered in the register or noted against the registered title ; and the general rules provide in great detail for such notices, cautions, &c.,—both as regards their effect while continuing to have effect, and as regards their discharge or removal ; and the first schedule to the rules gives the prescribed forms of the notices, cautions, inhibitions, and restrictions, and shows also the circumstances in which (and the purposes for which) they are available (and are to be used).

And for the greater protection of purchasers and mortgagees of registered land, it is provided by the Act of 1897 (sect. 8), that so long as a land certificate, office copy of a registered lease, or certificate of charge, is outstanding, it shall be produced to the registrar,—on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates ; and on every registered transmission or rectification of the register ; and a note of every such entry, transmission, or rectification shall be officially endorsed on the certificate or office copy ; and the like note is to be made on that certificate or office copy,

(*i*) Act 1897, s. 16 (3).

where same is retained in the registry ; and the vendor is required where the certificate or office copy has not been so retained, to deliver it to the purchaser ; and a new certificate or office copy will not be readily issued, where the one originally issued is alleged to have been lost.

The Land Transfer Act, 1875 (by sect. 125), excludes for the future any registration under the 25 & 26 Vict. c. 53, before mentioned ; and provides (by sect. 126) that any proprietor registered under that earlier Act, may, if he choose, re-register under the Act of 1875, although he is not obliged to do so, and until he does, the effects of the existing registration under the earlier Act are to remain. And as regards land acquired by county councils, under the provisions of the Small Holdings Act, 1892 (55 & 56 Vict. c. 31),—being land acquired by such councils to be sold as small holdings in the nature of allotments for the industrious poor,—such land may be registered, in like manner as land is registered, and any small purchaser under the county council may be registered (and, in each case, with an *absolute* title) (*k*), in like manner as any ordinary purchaser would be registered under the Land Transfer Acts, 1875—1897, and with substantially the same results and consequences ; and the duty of carrying out the Small Holdings Act, 1892, is now, by the Local Government Act, 1893 (56 & 57 Vict. c. 73), devolved upon the parish council in the case of rural parishes.

The Acts of 1875—1897 and the general rules made thereunder which have been hereinbefore referred to, contain also many other provisions (and some of them of a very minute character) which it is impossible to summarise in a treatise like the present ; and the Act of 1897, s. 7, provides also for persons being indemnified, who are injured by reason of fraudulent entries in the register or by reason of errors and omissions therein or therefrom which are not capable of rectification, or who are injured by any rectification of the register,—the indemnity

(*k*) Act 1897, s. 19.

being payable out of the consolidated fund, and the government being entitled to recover against the wrong-doer the amount so paid; and the Act of 1897 also provides (by sect. 21) for the creation of an insurance fund in aid of the liability of the consolidated fund, and in recoupment of all payments made out of such latter fund.

Registered dealings with land, although they have much to recommend them, are nevertheless attended with certain disadvantages; for mortgages and charges (even land charges, judgments, and the like) are not intended to be forthwith discharged so soon as they are effectively created, but are rather intended to (and do usually) continue in existence for a long time after their creation; and the multiplicity of them, which ensues therefore, eventually after a few years, adds greatly to the difficulty of clearly ascertaining, even in the case of registered land, on the occasion of each subsequent dealing with the land by way of sale or mortgage, that the title is in fact free from incumbrances, and from other such like matters affecting (or which may affect) either the title to or the full and free enjoyment of the lands; and solicitors and trustees conducting or effecting purchases and mortgages on behalf of their clients and *cestuis que trustent* respectively, have been many times hit, as for negligence in not discovering in time the registered adverse dealing, and have accordingly been made liable to personally make good the loss sustained. The Acts, therefore, which we have been discussing contain in general a provision, whereby solicitors and trustees may procure an "*official search*" to be made in the registries, and an "*official certificate*" to be given them of the result of such searches; and the Conveyancing Act, 1882 (*m*), having paved the way for such official searches and official certificates in the case of judgments, crown debts, and the like, the provisions of that Act in this behalf have been in general adopted also, by reference or otherwise, in the more recent Acts

(*m*) 45 & 46 Vict. c. 39, s. 2.

concerning registration, *e.g.*, by sect. 17 of the Lands Charges, &c. Registration Act, 1888, and by sect. 2 of the Land Registry (Middlesex Deeds) Act, 1891 ; and by the First Schedule to the last-mentioned Act, and the express provisions of a rule made for carrying into effect its provisions (*n*), when anyone obtains, in the prescribed manner, an official certificate of search (*scilicet*, in respect of matters proper for registration in the Land Registry, Middlesex Registration Branch), he shall not be answerable in respect of any loss that may arise from error in such certificate ; and where such a certificate is obtained by any solicitor acting for trustees, executors or other persons in a fiduciary position, these latter or any of them shall not be answerable in respect of any loss so arising. And under the rules as to official searches (Rules 222—230) made pursuant to the Land Transfer Act, 1897, s. 22, it is provided (by Rule 228), that when a solicitor or other person obtains an official certificate of the result of any search, he shall not be answerable in respect of any loss which may arise from any error in the certificate ; and that when the certificate is obtained by a solicitor acting for trustees or executors, or other fiduciary persons, these persons also shall not be answerable.

In the same year that the office of Land Registry was established by the 25 & 26 Vict. c. 53, there was passed a somewhat similar Act, namely, the 25 & 26 Vict. c. 67, whereby a *judicial* declaration of title might be obtained, provided the conditions prescribed by the Act were complied with ; but the prescribed conditions were of a very burdensome character, and the Act has accordingly proved a dead letter ; still the provisions of the Act, seeing that they remain unrepealed, may be here stated,—although it will be sufficient to state them with brevity. The Act, after reciting the expediency of enabling landowners to obtain, by judicial declaration, a title that

(*n*) Rules of Feb. 1892, r. 14.

should be indefeasible in favour of purchasers for value, enacted that, on the petition of the landowner, the Court might order his title to be investigated in the same way as if he had obtained, as vendor, a decree for the specific performance of an agreement for the sale of the land in question for the estate claimed in his petition (*o*) ; and that, after such investigation, if the Court was satisfied that the petitioner had shown such a title as it would have compelled an unwilling purchaser to accept, it should (on the conditions in the Act mentioned) make an order that, on some day not less than three months afterwards, a declaration should be made establishing the petitioner's title, unless in the meantime cause was shown to the contrary (*p*). And in order to secure the object of duly affording to all persons concerned the opportunity of showing cause against the making of the declaration, a copy of the order was required to be served on such persons, and deposited in such places, as in the Act described, for inspection ; and such notice of the same having been so deposited was also to be duly given as by the Act prescribed ; and the petitioner was required also to cause advertisements to be inserted three times at least in such newspapers, and on such days, as the Court should direct, stating the order and also stating where any copy of it had been so deposited for inspection (*q*). Then, if no petition was presented against the proposed declaration of title within the time limited for that purpose,—or if one had been presented, but the Court was of opinion that no sufficient ground had been shown for refusing to make the declaration,—the Court, upon being satisfied that all the requisitions prescribed by the Act had been duly complied with, made a declaration, that the petitioner had such title to the lands in question as he sought to establish by his petition, or such title subject to any qualifications necessary

(*o*) Sect. 6.

(*p*) Sect. 8 ; *In re Roberts*, L. R. 10 Eq. Ca. 402.

(*q*) Sect. 7.

or proper to introduce into the order (*r*) : And the effect of the declaration of title, once obtained, is by the Act stated as follows :—"Such declaration of title, as soon "as it shall have become final for the purpose of this "Act, shall (in favour of any person thereafter deriving "title as a purchaser for valuable consideration of the "land therein referred to, or of any part thereof, or of "any estate, right, or interest therein, from or under the "person whose title has been so declared) be deemed and "taken to have correctly declared the same ; but save "as aforesaid, such declaration shall have no force or "effect whatever as to the title to the land comprised "therein" (*s*). But, by sect. 29 of the Act, the declaration of title did not affect land tax, succession duty, tithe rentcharge, rights of common, ways and the like, rents payable to the crown, franchises and the like, or public rights of way.

(*r*) Sect. 15.

(*s*) 25 & 26 Vict. c. 67, s. 24.

CHAPTER XXVI.

ON THE DEATH DUTIES ON LAND, AND OF THE ESTATE DUTY IN PARTICULAR.

A DUTY under the name of legacy duty has for a very long time been payable by the law of England on the beneficial interests in personalty devolving upon the deaths of deceased owners, whether dying testate or intestate ; and regarding this duty, more will be said when we come to treat of title by will and by administration (*a*), it being sufficient in this place to mention, that the legacy duty ranged, and (unless where otherwise hereinafter mentioned) still ranges, from 1 to 10 per cent. Also, a duty under the name of probate duty has for a very long time been payable by our law on the total net amount of the personal estate of a deceased testator or intestate passing under his will or upon his intestacy,—and to that duty a further duty called account duty was latterly added,—both which duties were payable by the executor or administrator of the deceased, on his applying for probate of the will, or (as the case might be) for a grant of letters of administration to the personal estate of the deceased, as will also be more fully explained hereafter, in the chapter on title by will and by administration.

But as regards land (that is to say, real estate), no probate duty or account duty was ever payable ; but a duty under the name of succession duty, and which corresponded (in essentials) with the legacy duty above mentioned, and was not at all like probate or account duty, was imposed in the year 1853, on the beneficial interests

(*a*) Bk. II. pt. II. ch. VII.

in land devolving on the death of the deceased landowner (called the predecessor) upon the persons then becoming entitled thereto, under the will, or upon the intestacy, of such deceased owner, the Act by which this succession duty was originally imposed having been the 16 & 17 Vict. c. 51, and which Act applied, and still applies, to all deaths which have happened since the 19th day of May, 1853, or which shall hereafter happen. And it will be convenient here to expound, with some little detail, the provisions of the Act in question, and of the few Acts which have in some few particulars amended it ; and it will thereafter be convenient to consider, also, and with some greater detail, the provisions of the Finance Act, 1894 (57 & 58 Vict. c. 30), by which a new death duty has been created under the name of estate duty, and which new duty corresponds (in essentials) with the probate duty above referred to, which it supersedes ; but the new duty extends not only to personal estate (on which alone probate duty and account duty were formerly chargeable), but also to real estate (which, as we have said, was theretofore exempt altogether from probate duty and from account duty).

Firstly, the *Succession Duty*.—This is a duty payable by the successor to real property, when the succession is on death, and the successor is (in effect) a volunteer, and not a purchaser for value ; and it is payable also in respect of any increase of beneficial interest accruing or arising to the successor, through the cesser (upon death) of any annuity or other like charge on the real estate comprised in the succession. The duty varies according to the degree of consanguinity of the volunteer to the donor of the real estate ; and is calculated according to a varying percentage on the value of the succession to the successor ; and is made payable by certain prescribed instalments,—the first of them becoming due and payable at the expiration of twelve calendar months from the time when the successor's title accrues in possession. The varying percentage at

which the duty is, by the Act, appointed to be calculated appears by the following statement (*b*), namely :—

£1 per cent. on the value of the succession, where the successor is of the lineal issue or is a lineal ancestor of the predecessor ;

£3 per cent. on the value of the succession, where the successor is a brother or sister or a descendant of a brother or sister of the predecessor ;

£5 per cent. on the value of the succession, where the successor is a brother or sister of the father or mother of the predecessor or is a descendant of such a brother or sister ;

£6 per cent. on the value of the succession, where the successor is a brother or sister of the grandfather or grandmother of the predecessor or is a descendant of such a brother or sister ; and

£10 per cent. on the value of the succession, where the successor is in any other degree of collateral consanguinity to the predecessor, or is a stranger in blood to him.

And as regards the value of the succession, in the case of each successor, his beneficial interest (*i.e.*, his succession) is to be deemed to be of the value of an annuity equal to the annual value of the real estate comprised in his succession, such annuity being taken as continuing during his life or for any less period for which the estate is limited to him, and the value of such annuity is (for the purposes of the duty) ascertained according to certain tables set forth in a schedule to the Act.

And as regards the actual payment of the duty, it is, by the Act, appointed to be paid by eight equal half-yearly instalments, the first to be paid at the end of twelve months after the successor shall have become entitled (*scilicet*, in possession) to the beneficial enjoyment of the property, the seven remaining instalments being made

(*b*) 16 & 17 Vict. c. 51, s. 10.

payable at equal half-yearly intervals of six months each, to be computed from the day on which the first instalment was due and payable; and these rules as regards the ascertainment of the duty payable, and as regards the payment thereof, apply whether the successor shall be entitled for his life only or other such less estate as aforesaid, or shall be entitled in fee simple or in fee tail; but it is provided, that in case the successor shall die before all the instalments of duty fall due and become payable, the remaining instalments (*scilicet*, those not already fallen due and become payable) are to cease to be payable, when the succession then ends (*i.e.*, when the estate of the successor then determines); on the other hand, in the case of a successor whose estate does not so then determine, or who was competent to dispose by will of a continuing beneficial estate or interest in the land comprised in his succession, it is provided that the instalments remaining unpaid at his death, whether then already due and payable, or thereafter accruing due and payable, are to continue payable; and for this purpose they constitute a charge upon the land comprised in the succession, and this in exoneration of the other property of the deceased successor (*c*),—so that there arises (in such a case) a *double* succession duty, that is to say, the new successor becomes liable for his own new succession duty and also for the unpaid remnants of the old succession duty originally payable by his immediate predecessor.

And as regards estates and interests arising under powers of appointment and the exercise of such powers (being powers contained in deeds or other dispositions of property that take effect upon the death of anyone), it is provided, that, in all cases of a general power of appointment, the donee of the power shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the

(*c*) 16 & 17 Vict. c. 51, s. 21.

real estate thereby appointed, and to be entitled thereto as to a succession derived from the donor of the power as the predecessor. On the other hand, in all cases where the power of appointment aforesaid is merely a special power (that is to say, is a power which the donee thereof cannot exercise for his own sole and exclusive benefit), it is provided, that the appointee who becomes entitled under any exercise of the power (and not, as in the former case, the donee of the power) shall be deemed to become entitled to the real estate appointed to him, as to a succession derived from the donor of the power as the predecessor (*d*). But the donee of the power, where (as in the case of a general power) he becomes chargeable with the duty, is not to be subjected to double duty, that is to say, he is not to be chargeable with duty in respect of the real estate appointed by him under such general power, and also with the duty payable on a succession in the same property taken by himself independently of the power ; but in the case of such conjunction of general power with beneficial estate, he is to be allowed, off the duty payable by him as donee of the power, any duty he may have already paid in respect of his own independent beneficial succession (*e*).

These observations will suffice on the succession duty as originally imposed by the statute 16 & 17 Vict. c. 51,—there being, however, many specific provisions contained in that Act which are of too minute a character to be dealt with in this work : and the Act extends also to leasehold property (*f*) (although that is, strictly speaking, personal estate and not real estate), and extends also, in fact, to all personal estate whatever devolving upon death and under circumstances in which it is not liable to legacy duty (*g*).

The Succession Duty Act of 1853 has been recently amended, in some few particulars, by the 51 & 52 Vict. c. 8, s. 21, 52 & 53 Vict. c. 7, ss. 10—15, and 57 & 58 Vict. c. 30, s. 18 ; and the amendments so made (so far as it is

(*d*) 16 & 17 Vict. c. 51, s. 4.
(*e*) *Ibid.* s. 33.
(*f*) *Ibid.* s. 1.
(*g*) *Ibid.* ss. 29, 30.

convenient to refer to them specifically in this work) are shortly as follows: By the first of the three Acts, an additional succession duty of 10*s.* per cent. has been added to the succession duty when payable at the rate of 1*l.* per cent., and an additional duty of 30*s.* per cent. has been added to the succession duty when payable at the rate of 3*l.*, 5*l.*, 6*l.*, or 10*l.* per cent.—By the second of the three Acts, certain provisions are made for the protection of purchasers and mortgagees against liability for the unpaid succession duty, where they are *bonâ fide* purchasers or mortgagees, and were without notice of the duty having remained unpaid; and this protection arises, in favour of such *bonâ fide* purchasers and mortgagees, after the expiration of twelve years (and, in certain cases, after the expiration o six years) from the happening of the succession.—By the third of the three Acts, but only, *semble*, in the case of successors competent to dispose of the real estate comprised in their succession, it is provided, that the value of the succession on which the succession duty is to be payable shall be the principal value of such real estate, *less* the estate duty imposed by that Act, and *less* certain expenses incident to the payment of such last-mentioned duty; and the principal value aforesaid is now to be ascertained in the same way as if it were being ascertained for the purposes of the estate duty; and the succession duty is now to be payable by the like instalments as by the Act are appointed for the payment of the estate duty thereby imposed: which consideration brings us to that duty.

Secondly, the *Estate Duty*.—The statute 51 & 52 Vict. c. 8, besides amending the Succession Duty Act, 1853, in the particulars above referred to, imposed also a new duty called the estate duty,—being a duty at the rate of 1*l.* per cent., firstly, on all personal estate liable to probate duty where the estate on which such duty was to be paid exceeded 10,000*l.*, or liable to account duty where the

estate on which such duty was to be paid exceeded 10,000*l.*; and, secondly, on all real estate comprised in any succession and liable to succession duty, where the estate on which such duty was to be paid exceeded 10,000*l.* But the duty so imposed was intended to be of a merely temporary character; and it is hereinafter referred to as the temporary estate duty, that being also the designation by which it is referred to in the Finance Act, 1894, already mentioned, being the Act under which the estate duty properly so called, and which we now proceed to consider, has been imposed.

By the Finance Act, 1894, s. 1, estate duty is imposed, in the case of any death on or after the 2nd August, 1894, on all property, whether real or personal, *passing on such death* (*h*); and in every such case, the estate duty so imposed is in lieu of and supersedes the probate duty and the account duty respectively before referred to, and also the additional succession duty before referred to, and also the temporary estate duty before referred to; and also (but only in cases where it would have been payable at the rate of 1*l.* per cent.) the legacy duty aforesaid and the succession duty aforesaid; and the estate duty so imposed is a duty payable in respect of the *corpus* of the estate (otherwise the inheritance) (*i*),—in whatever shares the beneficiaries may ultimately contribute thereto.

The new estate duty, hereinafter called simply the estate duty, is payable on the principal value of the entire property passing on the death; and it is to be calculated according to a percentage varying with, and gradually increasing with the increase in, the amount of the principal value of the estate subject thereto, that is to say:—By sect. 17, the rate payable is 1*l.* per cent. when the principal value (being over 100*l.*) does not exceed 500*l.*; 2*l.* per cent. when the principal value (being over 500*l.*) does not

(*h*) *Att-Gen.* v. *Beach*, [1898] 2 Q. B. 147, aff. *Dom. Proc.*

(*i*) *In re Parker-Jervis*, [1898] 2 Ch. 643.

exceed 1,000*l.*; and thereafter 3*l.* per cent. up to a principal value of 10,000*l.*, 4*l.* per cent. up to a principal value of 25,000*l.*, 4½*l.* per cent. up to a principal value of 50,000*l.*, 5*l.* per cent. up to a principal value of 75,000*l.*, 5½*l.* per cent. up to a principal value of 100,000*l.*, 6*l.* per cent. up to a principal value of 150,000*l.*, 6½*l.* per cent. up to a principal value of 250,000*l.*, 7*l.* per cent. up to a principal value of 500,000*l.*, 7½*l.* per cent. up to a principal value of 1,000,000*l.*, and 8*l.* per cent. on the principal value of every estate the principal value of which exceeds 1,000,000*l.*; so that, *e.g.*, an estate of the principal value of 300,000*l.* would pay an estate duty of 21,000*l.*, and an estate of the principal value of 3,000,000*l.* would pay an estate duty of 240,000*l.*, the latter amount of duty being (by 30,000*l.*) greater than ten times the former amount of duty, although the principal value of the latter estate is only ten times more than the principal value of the former estate,—this difference showing the principle of what is called a graduated death duty.

In order to ascertain the percentage payable, all the property passing on the death is thrown together and forms what is called an aggregate estate (sect. 4); and the property to be so aggregated (that is to say, *the property passing on the death*) consists of and comprises (roughly) all the property (real and personal) of the deceased, all general powers of appointment vested in him, all property which (being personal estate) would have been subject to the old account duty, or which (being real estate) would, if it had been personal estate, have also been subject to the last-mentioned duty,—and includes also, of course, any access of interest accruing on the death, by, *e.g.*, the cesser of an annuity or the like (sect. 2); and it matters not, in the general case, whether the property is situate out of the United Kingdom or not, but any duty payable, by the *lex situs*, on property abroad is to be deducted from the principal value of the property subject to estate duty (sect. 20). Of course, the estate

duty does not attach, or extend, to property passing on the death of the deceased of which he was but a trustee for third parties or strangers, without having therein any continuing beneficial interest of his own (sect. 2, sub-sect 3); but trust property held by him, under trusts created by himself, must be at least a year old (that is to say, the trust-dispositions must be at least a year old) at his death, and must be absolute alienations of the property comprised therein, if they are to escape liability to duty (sect. 2, sub-sect. 3); moreover, *bonâ fide* purchasers for full consideration are exempt (sect. 3), although their purchases should have left a life estate outstanding in the deceased (their vendor),—an exemption which is manifestly not intended to extend to the purchaser, from the reversioner or remainderman, of his reversion or remainder falling into possession on the death of the deceased. But the annuities and pensions granted by the Government of British India, and payable to the widows and children of deceased officers of that Government, are expressly exempted (sect. 15); and an advowson is only to be aggregated with the other property passing on the death of the deceased, if it be (in effect) sold, and then only the net sale proceeds are to be aggregated (sect. 15); also, certain pictures and the like, of an historical interest, bequeathed (in effect) to the nation, may be specially exempted (sect. 15); and, by the 59 & 60 Vict. c. 28, s. 20, pictures, works of art, and other like things not yielding income are to form an estate by themselves, and are not to be aggregated with the general estate; and while they are enjoyed in kind by a person not capable of disposing of them, they are to be exempt from estate duty,—but otherwise they are liable to the duty.

The parties required to pay the estate duty are as follows:—Firstly, as regards all those parts of the aggregate estate which vest (*scil.*, which used to vest) in the executor *virtute officii* (or, in the words of the Act, all the personal property, wherever situate, of which the

deceased was competent to dispose at his death), the executor is required to pay the proportion of the estate duty thereon (sect. 6), together with interest thereon at the rate of 3 per cent. from the death down to the delivery of the Inland Revenue affidavit (*k*); but if such affidavit is not delivered within six months from the death, then the estate duty (this proportion of it) with interest thereon at 3 per cent. from the death up to the expiration of these six months becomes *duty in arrear* (sect. 6, sub-sect. 10), and thereafter carries interest at 4 per cent. (sect. 8, sub-sect. 10), that being the rate of interest payable, under the 31 & 32 Vict. c. 124, s. 9, on arrears of legacy duty. Secondly, as regards all the other parts of the aggregate estate, the estate duty thereon (that is to say, the proportion of the duty attributable thereto) is required to be paid by the party accountable therefor (*i.e.*, by the beneficiary, or his trustee, in the case of personal property not constituting a succession; and by the successor, or his trustee, in the case of real property, and also in the case of personal property constituting a succession) (sect. 8, sub-sect. 4); but as regards any of such last-mentioned properties (on which the duty would be payable by the party accountable therefor), the executor may pay the duty in respect of all parts of such property that are under his control as executor, and also (but only on the request of the accountable party) in respect of the other parts thereof (being the parts not under his control as executor); and in all this second group of cases, equally as in the first group of cases, the interest at 3 per cent. from the death, and (after the expiration of the six months from the death) at 4 per cent. is payable. But as regards real estate, the party accountable may (at his option) pay the duty thereon (the proportion attributable to the property comprised in the succession) by eight equal yearly instalments or sixteen

(*k*) See also 59 & 60 Vict. c. 28, s. 18.

half-yearly instalments, with interest at 3 per cent. from the expiration of twelve months from the death, at which last-mentioned date the first instalment of the duty becomes in that case due (sect. 6, sub-sect. 8) (*l*), any instalment not paid on the due date becoming instantly *duty in arrear* and carrying 4 per cent. until payment; and (by sect. 18) this mode of paying the estate duty on real estate by instalments is made applicable also, for the future, to the payment of the succession duty properly so called of which we treated above (*scilicet*, where such last-mentioned duty still continues payable). And whereas the executor pays the estate duty on his delivery of the Inland Revenue affidavit, the accountable party (where he and not the executor is liable to pay it and pays it) pays it on delivery of an account setting forth the necessary particulars,—which account is to be delivered (like the Inland Revenue affidavit) within, at the latest, six months from the death of the deceased. And any alienee of an accountable party's interest, equally with the accountable party himself, is liable for the estate duty (sect. 8, sub-sect. 4); and a rateable part of the estate duty, as regards all those parts of the aggregate estate which do not vest (*scil.*, which used not to vest) in the executor *virtute officii* as aforesaid, is made a first charge on the property in respect of which it is leviable (sect. 9, sub-sect. 1); and presumably, therefore, this charge, if remaining unsatisfied at the date of any sale, will be paid out of the purchase money (sect. 6, sub-sect. 8; sect. 8, sub-sect. 10), just as the ordinary practice has been with unpaid succession duty, —and a purchaser or mortgagee will experience some difficulty in satisfying the Inland Revenue Commissioners, that he is entitled (within sect. 8, sub-sect. 18) to exemption from liability to the estate duty, by reason of his being a *bonâ fide* purchaser or mortgagee without notice.

The Finance Act contains also divers provisions of an extremely useful and practical character for raising the

(*l*) And see 59 & 60 Vict. c. 28, s. 18.

estate duty, and for giving limited owners and others who pay the whole duty the benefit of the charge for duty which (if the duty were unpaid) would subsist and continue to subsist against the property itself (sect. 9),—these provisions applying, of course, only to the estate duty (the proportion thereof) which is payable by the accountable party as contradistinguished from the executor; and the executor paying any estate duty which he is not (by the Act) required as such to pay, is equally entitled to the benefit of such a charge (sect. 9, sub-sect. 4). The Act contains also provisions for the return of estate duty when too much has been paid, and for the payment of further duty when too little has been paid, in the first instance; and provisions for postponing payment on terms, in cases in which the whole duty cannot, without a great sacrifice or hardship to the estate, be paid at once; and provisions for the commutation of the duties on remainders, reversions, and other future interests (all of which are, in the Act, called *interests in expectancy*) (sect. 12), and for the payment of one lump composition duty where the interests are complicated (sect. 13); and for the granting of certificates by the commissioners, to the effect that the duty (or, as the case may be, the rateable proportion thereof) has been paid (sect. 11).

But as regards property vesting in the executor *virtute officii*, it is to be remembered, that real estate to which the deceased was solely entitled in fee simple now vests in him, by virtue of the 60 & 61 Vict. c. 65, s. 1; but whether the executor becomes therefore *bound* to pay the estate duty in respect of such real estate, appears to be, at the least, doubtful; and most probably, having regard to sect. 5 of that Act, he is not *bound* to pay that duty, but in due course transmits the real estate to the heir or devisee thereof, subject to the duty (sect. 3.)

Besides the estate duty, the Finance Act, 1894, by sect. 5, imposes a *further estate duty*, in the Act called *settlement estate duty*; and (by sect. 17) fixes one uniform

rate of 1*l.* per cent. for this further estate duty; but the settlement estate duty is only payable in the cases following, and only once during (in effect) the continuance of the settlement, that is to say:—

Firstly, where the property is settled by the will of the deceased himself;

Secondly, where the property passing on the death of the deceased so passes under some old and continuing settlement (sect. 5, sub-sect. 1): and of course,—

Thirdly, under all settlements newly constituted after the commencement of the Act (*i.e.*, on or after the 2nd August, 1894) (sect. 21, sub-sect. 1).

But as regards, firstly, property settled by Act of Parliament or royal grant, in such manner as that the beneficiary cannot alienе it, the estate duty is payable, but not the further estate duty; and such settled property is, for the purpose of such estate duty, to be an estate by itself, and is not to be aggregated with any other property passing on the death of the deceased (sect. 5, sub-sect. 5). Also, by the 59 & 60 Vict. c. 28, s. 19, the settlement estate duty when payable in respect of a settled legacy is payable out of that legacy; and when payable in respect of personal property settled by the will of the deceased, is payable out of that property; but otherwise it is payable out of the property generally (*m*). And, by the 61 & 62 Vict. c. 10, s. 14, any settlement estate duty payable in respect of any property which is only contingently settled, if actually paid, is to be refunded on the contingency failing to happen.

And as regards, secondly, small estates, where the property (real or personal) on which the estate duty is payable does not exceed 1,000*l.* in value, it is made to form (for the purposes of the estate duty) an estate by itself, and is not aggregated with the other property (if any) passing on the death of the deceased; and the estate duty, being

(*m*) *Gribble* v. *Webber*, [1896] 1 Ch. 914; *Cook* v. *Culverhouse*, [1896] 2 Ch. 251; *Wade* v. *Wade*, [1898] 2 Ch. 276.

paid on such estate by itself, supersedes not merely the settlement estate duty, but the legacy and succession duties also (sect. 16, sub-sect. 3); and estates not exceeding 300*l.*, go free of all duty on payment of 30*s.* only; and estates not exceeding 500*l.* go free of all duty on payment of 50*s.* only.

And in conclusion upon the Finance Act, we will observe that, among other provisions for the due and fair ascertainment of the principal value on which the estate duty is to be paid, the Act contains the following provision (sect. 7, sub-sect. 5), namely, that the principal value of any property shall be estimated to be the price which (in the opinion of the Commissioners) such property would fetch, if sold in the open market at the time of the death of the deceased,—a provision which may possibly prove helpful to persons succeeding to large landed estates of an agricultural character, so long (at least) as the value of that species of property continues to be so depressed, and the market for the sale thereof so stagnant, as it has for some long time been, and is at the present moment; and the Act also otherwise shows a reasonable leniency towards this class of successors (*n*).

(*n*) See also the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), being an Act for the relief of the occupiers (and so, indirectly, for the relief of owners), for the period of five years from the 31st March, 1897.

END OF THE FIRST VOLUME.

INDEX

TO THE FIRST VOLUME.

A.

Abandonment,
of easement, 495.
property, 106.

Abeyance,
of fee, 156, 236 n
freehold, 156.
dignities, 288.

Abjuration, 98.

Abolition,
of fines and recoveries, 397, 400.
colonial slavery, 74.
military tenures, 133, 411.

Abridgments (or digests), 30.

Absolute fee simple, 158.

Absolute alienation, 517.

Absolute title,
registration with, 546, 549, 551.

Absque disparagatione, 126.

Abstract of title, 501, 556, 557.

Abuse of office, 211, 495.

Accession of interest, 248.

Accessorium,
sequitur principale, 227, 484.

Account duty, 568.

Accountable party, 573.
account by, 573.

Accrual,
of rent, 174.

Accumulation of income, 390, 391, 514

Acknowledgment,
by mortgagee of mortgagor, 219.
of married woman, 334, 335, 407, 450.
of right to production, 499.
vassalage, 115.

Acreage rent, 529.

Active trusts,
uses, 267.

Act of law, 277.

Act of ownership, 198.

Act of the parties, 277.

Act of Parliament,
how cited, 45.
local and personal, 39, 429.
public and private, 45.
conveyance by, 428.

Action or entry, 358, 396.

Actions,
on statutes, 46.
real, 325.

Actual entry, 509.

Actual tenant in tail, 401 n.

Actus Dei,
nemini facit injuriam, 171.

Admeasurement,
of dower, 181.

Administration,
of assets, 300, 301.

Admiralty,
jurisdiction of, 79.

Admittance,
to copyhold, 442, 443, 444.

Ad ostium ecclesiæ,
dower, 180, 184, 185 n.

Ad quod damnum,
writ of, 318.

Adultery,
effect of, on dower, 178, 179.
on jointure, 183.

Adverse possession,
title by, 311.
by tenant for life, effect of, 311.
in case of registered land, 552, 556.

Advowsons,
duty on, 571.
partition of, 254.

Æquitas sequitur legem, 272.

Africa,
Acts relating to, 70 n.

After-acquired lands, 411, 412.

After possibility of issue extinct,
tail estate, 174, 400.

Aggregate corporation, 258, 259, 261.

Aggregate estate, 570.

Agreement to let, 360, 508.

Agricultural Holdings Act (1883), 196, 204.
compensation under, 205, 218.
fixtures under, 204.

Agriculture, Board of, 451, 462, 533.

Agricultural rates, 576 n.

Aids, 116.
in knight service, 127, 128.
socage, 136.

Air,
right to, 494.

Alderney, 66.

Alfred,
his laws, 21.

Alienation,
in general, 156, 327 *et seq.*
by deed, 328.
will, 329.
in mortmain, 316 *et seq.*
by corporations, 331, 332.

Alienation—*cont.*
to corporations, 319 *et seq.*
by infants, 333, 334.
lunatics, 333.
married women, 334.
particular tenants, 324.
tenant for life, 242.
joint tenant, 248.
tenant in tail, 165.
in case of copyholds, 143, 441.
fines on, 116, 130. 137, 146, 328.
forfeiture by, 316, 324.
licence for, 441.
of settled estates, 242 517 *et seq.*
restraint upon, 516, 519, 520.

Aliens, 305.
can now hold real property, 306, 335.
can now take by descent, 306.
naturalization of, 306.
tracing descent through, 306.

Alienee,
of trust estates, 262, 270.

Allodial property, 115, 121.

Allotments,
under Inclosure Acts, 464.
Small Holdings Act, 558.
for labouring classes, 558.

Alluvion, 314.

Alterations,
in deeds, 349.
wills, 416, 417.

Ambiguity,
in a deed, 351.
will, 351, 417.
latent and patent, 351, 352.

Ambulatory,
character of will, 409.

American colonies,
Acts relating to, 70 n.
revolt of, 69.

Ancestors, 153, 298, 489.

Anglo-Saxon Laws, 21, 22.

Animals *feræ naturæ*, 209, 471.

Animo revocandi, 416.

Annexation, 202.

Annuities, 160, 478.

Antient demesne, 146.

Antient freeholds, 155.

Antient lights, 467, 493.

Antient monuments, 320 n.

Apparent heir, 278.

Appeal,
from colonies, 71.
to Privy Council, 71.
House of Lords, 61.

Appendant, 457, 484.

Appointment, 386, 387, 423, 424.
succession duty in case of, 566, 567.

Apportionment,
of condition, 508.
common, 484.
rent, 173, 483.

Apportionment Act (1870), 173, 483.

Apprentieii ad legem, 6.

Appropriation,
of tithes, 80, 81.
real estate, 275, 555.
mine rents, 532, 541.
water, 467.
lands for streets and gardens, 525, 530.

Approving common, 462.
month's notice before, 462.

Appurtenances, 341, 418, 484.

Appurtenant, 458, 484.

Arable land, 458.

Arbitrary fines, 146.

Arbitrary tithes, 80, 81.

Archbishop's province, 79.

Archdeaconry, 80.

Aristocracy,
government by, 12, 13.

Arms,
right to carry, 104.
training to the use of, 104.

Arrangement, deeds of,
registry of, 544, 545.

Articles of union
with Ireland, 61, 62.
Scotland, 53.

Artisans' dwellings, 524.

Ascending line,
formerly excluded from inheriting, 290.
may now inherit, 290.

As of fee, 154, 227, 233.

As of freehold, 168, 227, 233.

As of right, 35.

Assensu patris, 180.

Assent, Royal, 41, 72.

Assets,
in equity, 275, 300, 313, 440.

Assign, 404.

Assignee of lease,
liability of, 370.
distinguished from underlessee, 371.

Assignment,
of contingent interests, 330.
dower, 181.
estate at will, 197.
lease, 359, 370.
right of entry, 214.
satisfied terms, 511.
conveyance by, 359, 370.
distinguished from underlease, 370, 371.
of estate, powers remain, 516, 519, 520.

Assignment on sale,
effect of, if unregistered, 549.

Assigns, 159.

Assize,
judges of, 89.
commissioners of, 89.

Assize, rents of 480.

Assurances, common, 354.

Atholl, Duke of,
rights of, in Isle of Man, 65.

Attainder,
nature and effect of, in general, 130, 306, 309.
effect of, on dower, 179.
of trustee, 309.

Attainted persons,
alienations by, 331.

Attendant term, 510, 512.

Attestation,
of a deed, 348, 387.
will, 415.

Attorney to take admittance, 446.
powers of, 515 n.

Attornment, 327, 329, 376.

Augmentation,
of poor livings, 319.

Aula regis, 5.

Australasia,
defence of, 70 n.
federation of, Act for, 70 n.

Australian colonies,
Acts relating to, 70 n.

Autre droit,
land held in, 228.

Autre vie,
tenant *pur*, 168.
will of estate *pur*, 313.

A verbis legis, non recedendum est, 42.

Averium, 439.

Avoidance,
of a deed, 350.

B.

Bacon,
his abridgment, 30.

Bail,
excessive, 101.

Bailiffs,
of hundreds, 87.
Channel Islands, 66.

Banishment, 103.

Bankrupt trustee, 272 n.

Bankruptcy,
of tenant in tail, 166, 167.
tenant in fee simple, 300, 301.
lessee, 509, 510.
registered proprietor, 555, 556.

Bar,
of dower, 182.
estate tail, 165, 166, 392 *et seq.*
by vesting order, 406.
of quasi-entail, 312, 313.
issue, 396.
remainders, 399.

Bar students, 7.

Bare authority, 151, 152.

Bare possibility, 151.

Bare trustee, 274, 404.

Bargain and sale, 261, 375.
good without entry, 377, 380.

Barristers, 7.

Base fee, 162, 403.
enlargement of, 404.

Base services, 122.

Bastard,
cannot be heir, 304.
eigné, may be heir, 304, 305.

Basutoland, 70 n.

Battery, 99.

Beasts of forest, &c., 471, 472.

Bechuanaland, 70 n.

Bed of river, 466.

Bedfordshire, 543.

Benchers, 7.

Benefice, 114.

Beneficia, 114 n.

Beneficial owner, 497.

Benefit of survivorship, 254.

Bequests, 409 *et seq.*

Berwick-upon Tweed, 57, 58 n.

Bishoprics,
English, 79.
colonial, 67 n.
Indian, 76.
suffragan, 80 n.

Bissextile year, 188.

Black mail, 480.

Blood,
of the purchaser, 117, 118, 281, 283, 284.
whole and half, 292, 293, 295.
inheritable, 117, 281 *et seq.*
corruption of, 307, 308, 309.

Board of Agriculture, 451, 462, 533.

Board of Control, 75, 76.

Bodily rights,
how protected, 96, 97.

Body,
in estate tail, 162, 163.

Body corporate, 258 *et seq.*

Bonâ fide purchases, 321, 322

Borough,
definition of, 86.
municipal, 87 n.
parliamentary, 86 n.

Borough English, 32, 33.
tenure by, 138.

Borseholder, 86.

Botes,
of tenant for life, 169.
years, 169.

Boundaries,
of parishes, 81.

Bracton, 29.

Breach of condition, 214.

Breach of covenant, 214, 351, 508, 528, 540.

Break in descent, 298.

Brehon law, 58.

Brevia testata, 348.

British Columbia,
Acts relating to, 70 n.

British Honduras,
Acts relating to, 70 n.

British Kaffraria,
Acts relating to, 70 n.

British Museum, 322.

British Settlements, 70.

Britons,
laws of antient, 21.

Brooke's Abridgment, 30.

Brothers,
descent between, 292, 294, 307.

Building leases, 518, 528.

Building society,
mortgages, 555.

Burgage,
tenure in, 138.

C.

Calendar month, 189.

Call to the bar, 7.

Cambridge University, 322.

Canada,
Acts relating to, 70 n.

Cancelling,
deed, 349.
will, 413.

Canon law, 17
origin and growth of, 17.
sources of, 17, 18.
obligation of, 1, 19, 25.

Canons of 1603, 20.

Canons of Convocation, 19.

Canons of descent,
prior to 1st January, 1834, 279 n.
since 1st January, 1834, 279 *et seq.*

Cape of Good Hope,
Acts relating to 70 n.

Capital moneys, 532, 541.
application of, 534, 535.
investment of, 534, 537.

Capital punishment, 96, 97.

Capite,
tenants in, 121, 128.

Cart-bote, 169.

Castle, for defence,
no dower in, 179 n.

Cattle, 460.

Cattle gates, 463 n.

Cautions, 557.

Central office,
enrolments in, 402.
registrations in, 479.

Certain services, 122.

Certainty,
of custom, 36.
prescription, 489.

Certificate,
proof by, 34.

Certificate of acknowledgment, 408.
searches, 507, 559.
redemption, 482, 505.
charge, 553.
Board of Agriculture, 533.
Inland Revenue Commissioners, 574.

Cesser, 510, 570.

Cession,
colonies gained by, 66, 67.

Cestui que trust, 272.
use, 260.
vie, 241.

Chancel, repair of, 553.

Chancery,
inns of, 6, 7 n.

Channel Islands, 66.

Charge for duty, 573, 574.

Charge on registered land, 553.
certificate of, 553.
transfer of, 556.
realization of, 555.

Charge for expenses,
of enfranchisements, 454.

Charges register, 549, 550.

Charging real estate,
with debts, 299, 300.

Charitable uses, 320, 322 *et seq.*

Charity Commissioners, 323.

Charity, rents of, 482.
proof of, 482.
when perpetual, 482.

Charta de Forestâ, 472.

Charta, Magna, 38, 317.

Charter or deed, 337.

Charters, 207.

Chase, 474.

Chattels,
personal, 187, 188.
real, *ib.*
mixed, 199 *et seq.*

Chattels real,
distinguished from freeholds, 187.
varieties of, 188.
estate for years, 188.
from year to year, 194.
at will, 196.
sufferance, 198.
by statute merchant, 221.
statute staple, 221.
elegit, 222.

Chester,
county palatine of, 91.

Chief lord, 328.

Chief rents, 480.

Child in womb, 96, 97, 238, 389.

Children,
rights of, 107.
devises to, 422.

China,
Acts relating to, 70 n.

Chirograph, 338.

Chivalry,
tenure by, 124.
abolition of, 133.

Church,
of England, 55.
Ireland, 62 n.
Scotland, 55.

Churches, parish, 80, 81.

Churchwardens, 82.

City,
definition of, 86.

Civil death, 98.

Civil divisions,
of England, 85.

Civil government,
origin of, 11.
varieties of, 12.
in England, 13.
sovereign power in, 13, 14.

Civil injury,
distinguished from crime, 95.
redress for, 95, 96.

Civil law, 3.
origin and growth of, 16, 17.
sources of, 17.
obligation of, 1, 25.

Clementine Constitutions, 18.

Clergy, 2.

Clerks, 2.

Clerks, vestry, 84.

Close rolls, 430.

Close writ, 430.

Coat-armour, 207.

Code,
of Justinian, 17.
Theodosius, 17.
new, 17.

Codicil, 409.

Cognizance,
fine sur, &c., 394.

Cognizee,
of a fine, 393.

Cognizor.
of a fine, 393.

Coke,
his Institutes, 29.

Coke upon Littleton, 31.

Collateral inheritance, 281, 282, 292, 293, 295.

Collateral warranty, 344.

College leases, 322, 524 n.

Colleges, 322.

Colonial Laws.
Validity Act, 69, 72.

Colonies,
acquisition of, 66.
Acts relating to the, 70 n, 73 n
appeals from, 71.
bishops in, 75, 76.
church in, 67 n.
governors of, 67.
laws, of, 67.
legislatures of, 69, 70.
slavery in, 73, 74.

Commissioners,
copyhold, 451.
inclosure, 463.

Common, 457.
appendant, 457.
appurtenant, 458.
because of vicinage, 459.
in gross, 460.
by prescription, 458.
approvement of, 462.
extinguishment of, 463.
inclosure of, 463.
of estovers, 461.
pasture, 457.
piscary, 461.
shack, 459.
turbary, 461.
for cattle *levant* and *couchant* 460.
sans nombre, 461.
without stint, 461.
in the soil, 461.

Common assurances, 354.

Common law, 23.
dower at, 180, 181.
conveyances, 354 *et seq.*
prescription by, 488.

Common meadows, 460, 464 n.

Common Pleas,
fixed at Westminster, 5.

Common possibility, 236.

Common recovery, 165, 318, 397 *et seq.*

Common, tenancy in, 254.

Common vouchee, 398.

Commonable beasts, 457, 458.

Commons,
by prescription, 492.

Commutations of copyholds,
general, 451.
by apportionment, 452.
particular, 451.
effect of, 452.

Compensation
for breach of covenant, 509.

Competency of witness, 414, 416.

Composition,
for heriots, 440.

Compulsory,
admittance, 445.
custom is, 37.
purchase, 108.
enfranchisements, 454.
registration of title, 546, 549.

Computation of time, 188, 189.

Comyns' Digest, 30.

Concessit,
fine sur, 395.

Conclusion,
of a deed, 345.
fine, 394.

Concord,
of a fine, 393.

Condition,
breach of, 214.
continuing, 216.
estate upon, 211.
express, 212.
illegal, 215.
implied, 211.
impossible, 215.
in deed, 212.
precedent, 212, 215.
repugnant, 215.

Condition—*cont.*
subsequent, 212, 216.
of surrender, 447.
re-entry, 214, 215, 351, 508, 528, 540.
waiver of, 216.

Condition, Estates upon,
what are, 211,
implied, 211.
expressed, 212.
condition subsequent, 212, 216.
impossible, 215.
precedent, 212, 215.
forfeiture of, 215.
of mortgagees, 217 *et seq.*

Conditional fee, 158.

Conditional fee at common law, 158, 159.

Conditional limitations, 212.

Conditional surrender, 447.

Confirmation,
deed of, 367.
implied, 368.

Conflict of customs, 37.
powers, 520.

Conqueror, 277, 294.

Conquest,
colonies gained by, 66, 67.
of Ireland, 58.
Wales, 51.
technical meaning of, 277.

Consideration, 260, 350.
nominal, 378.

Consistent,
customs, 37.

Consolidated regulations,
of Inns of Court, 8 n.

Consolidation,
of mortgages, 515.

Consent,
of protector, 405.
parties interested, 428, 429.

Constable, high, 57.
of hundred, 87.

Constitutions,
legatine, 18.
provincial, 18.

Construction,
of customs, 37.
deeds, 351.
devises, 417.
royal grants, 432.
statutes, 43.

Constructive seisin, 485.

Contingency,
with a double aspect, 235.

Contingent duty, 575.

Contingent interest,
alienation of, 330.

Contingent remainder,
nature of, 234.
examples of, 234.
with double aspect, 235.
rules regulating, 236, 381, 382.
destruction of, 237, 238, 397, 400.
preservation of, 238, 239.
trustees to preserve, 239.
in trust estates, 272.

Contingent Remainders Act (1877), 240, 241, 386.

Contingent uses, 263.

Continual claim, 357.

Continuance,
of custom, 35.

Continuing breach, 216.

Contract,
heirs liability on specialty, 299, 300.
merger of simple, 337.
for sale, 501.

Contract and Conveyance,
distinguished, 334.

Control, Board of, 75, 76.

Conventional estates, 168.

Conveyances,
generally, 354.
at common law, 354.
primary, 364.
secondary, 364.
derivative, 364.
innocent, 388, 389.
tortious, 228, 234, 325, 388.
by aliens, 305, 306.
attainted persons, 331.
corporations, 331.

Conveyances—*cont.*
by idiots, 333.
infants, 333.
lunatics, 333.
married women, 334.
matter of record, 354.
statute law, 428.
tenants in tail, 401 *et seq*, 450.
the crown, 428.
in pais, 354.
of copyholds, 441 *et seq.*
practice as to preparing, 340 n.
to uses to bar dower, 182, 184.
under the Statute of Uses, 374.
Conveyancing Acts, 496.
Settled Land Acts, 516.
Land Transfer Acts, 556.

Conveyance on Sale,
effect of, if unregistered, 549.

Conveyancing Act (1881), 157, 215, 218, 220, 274, 345, 359, 367, 380, 388, 481, 486, 496, 512.

Conveyancing Act (1882), 388, 390, 407, 408, 512, 559.

Conveyancing Act (1892), 216, 508, 509, 510.

Conveyancing, system of, 354.

Convict trustee, 309.

Coparcenary, 250.

Copy,
of court roll, 143.

Copyhold Acts, 441, 450.

Copyhold Commissioners, 451.

Copyhold tenure,
origin of, 140, 143, 435.
no new creation of, 145, 435.
incidents of, 145, 146, 437.
commutation of, 441.
extinguishment of, 145, 441.

Copyholders, formerly villeins, 143, 435, 436.

Copyholds,
admittance to, 442, 444.
alienation of, 441, 442.
assets, 440.
commutation of, 451, 452.
curtesy in, 436.
descent of, 445.

Copyholds—*cont.*
devise of, 448.
dower in, 436.
enfranchisement of, 441, 453.
equitable interests in, 450.
estate tail in, 436.
execution against, 440.
extinguishment of, 441.
fines, heriots, &c., in, 438, 439, 455.
forfeiture of, 438, 441.
for life or years, 435.
freebench in, 436.
liability of, to debts, 440.
licence to demise, 441.
minerals in, 437.
mortgage of, 447.
of inheritance, 435.
married woman, 446.
partition of, 452.
quit rents in, 438.
rents of assize in, 438.
surrender of, 442.
waste in, 437.

Cornage, tenure by, 131.

Corodies, 456.

Corporate counties, 93.

Corporations,
aggregate, 261.
sole, 261.
ecclesiastical, 332.
lay, 332.
municipal, 86, 332.
purchases by, 316 *et seq.*
alienations by, 331 *et seq.*
leases by, 332.
sales by, 332.

Corporeal hereditaments, 112.

Corpus juris,
canonici, 18.
civilis, 17.

Corruption of blood, 307—309.

Co-tenants, 243 *et seq.*

Cottage gardens, 206.

Council of Governor-General in India, 75, 77.

Council of India, 77.

Counsel, 7.

Counterpart, 338.

Counties, 88.
corporate, 93.
palatine, 90.

County council, 558.

County courts, 89.

County of a town, 93.

County palatine, 90.

County rate, 90.

Court, Inns of, 6, 6 n.

Court,
of directors, 75.
proprietors, 76.

Court roll,
tenants by copy of, 143.

Courts,
baron, 144.
customary, 144.
of wards and liveries, 126.
great session in Wales, 52.
the counties palatine, 91, 92.

Covenant to stand seised, 261, 375.

Covenant, writ of, 393.

Covenants,
in a conveyance, 344.
lease, 344, 361.
implied, 344, 497, 498.
in case of registered land, 554, 555, 557.
running with land, 345, 361, 499.
breach of, 215, 351, 508, 528, 540.
waiver of, 216.

Credibility of witness, 414, 416.

Creditors,
payment of, 275, 300, 313, 440.
protection of, 350.
simple contract, 337, 338.
specialty, *ib.*
witnesses to wills, 416.

Crime,
distinguished from civil injury, 95.

Croke's Reports, 29.

Cross,
signing by, 346.

Crosses on lands, 318.

Cross-remainders, 257.
implied in wills, 257, 418.

Crown,
colonies, 72.
debts, 166.
jewels, 208.
private estates of, 434.
succession to, 287, 288.
grants by, 430 *et seq.*
forfeiture to, 307.
lands, 433.
licence, 259, 316, 319, 322.

Crown Land Acts, 434 n.

Cuicunque aliquid conceditur, 352.

Cujus est divisio,
alterius est electio, 253.

Cujus est solum,
ejus est usque ad cœlum, 116.

Curate, perpetual, 82.

Curtesy,
tenant by the, 175.
in gavelkind, 175.
separate estates, 177.
trust estates, 272.
copyholds, 436.
reversions, 227, 234.

Curtilage, 341, 418.

Custom and prescription, 486, 487.

Customary court, 144, 452, 453.

Customary dower, 436.

Customary freehold, 146, 148.

Customary heir, 445.

Customary heriot, 145.

Customary recovery, 449.

Customary rights, 486.

Customs,
source of unwritten law, 23.
must be of immemorial antiquity, 24, 435.
some derived from Civil Law, 24.
Canon Law, 24.
are either general or particular, 25.
general, examples of, 25.
validity of, 26.
expression of, 26.

Customs—*cont.*
general, proof of, 26.
old forgotten statutes, 31.
particular, examples of, 31.
origin of, 31.
varieties of, 32.
proof of, 33.
validity of, 34.
quasi-easements, claimed by, 487.

Customs of London, 32, 34.

Customs of merchants, 32.

Customs of York, 32.

Cyrographum, 338.

D.

Dane-Lage, 22.

Date of deed, 345.

Day,
computation of, 189.
fractions of, 189, 190.

Deanery, rural, 80.

Death,
civil, 98.
natural, 98.
wills speak from, 419.
are ambulatory until, 409.

Death duties,
on land, 563 *et seq.*
return of, 574.
postponement of, 574.
commutation of, 574.
composition for, 574.

Debts,
simple contract, heir's liability on, 298, 299.
specialty, liability of the heir on, 299.
payment of, out of realty, 275, 299, 300, 301.
out of *pur autre vie* estates, 313.
in bankruptcy, 301.
in case of copyholds, 440.
estate tail, 166, 167.

Declaration,
in bar of dower, 184.

Declaration of Title Act (1862), 560.

Declaratory,
law, 14.
statutes, 39, 40.

Declaring uses,
of fine or recovery, 400, 401.

Decretals, 18.

Decretum Gratiani, 18.

Dedication of land,
for streets and gardens, 525, 530.

Dedi et concessi, 115, 124, 358.

De donis
statute, 161.

Deed,
acknowledgment of, 334, 335, 407, 450.
alteration in, 349.
ambiguity in, 353.
attestation of, 348.
avoidance of, 349, 350.
cancelling of, 349.
conclusion of, 345.
condition in, 342.
consideration of, 350.
construction of, 351.
conveyance by,
freeholds, 337.
copyholds, 442.
counterpart of, 338.
covenants in, 344.
date of, 345.
definition of, 337.
delivery of, 347.
discharge of, 351.
disentailing, 166, 401.
execution of, 346.
habendum in, 341.
inconsistent clauses in, 352.
indented, 339.
in general, 337 *et seq.*
inter partes, 338.
of arrangement, 544.
defeasance, 372, 385.
exchange, 362.
partition, 253, 363.
release, 351, 364.
original and counterpart, 338.
or escrow, 347, 348.
poll, 339.
premises in, 340.
rasure of, 349.
reading of, 346.
recitals in, 340.
reddendum in, 342.

Deed—*cont.*
registration of, 542 *et seq.*
release of, 351.
requisites of, 340 *et seq.*
sealing of, 346.
signing of, 346, 347.
stamps on, 339 n.
tenendum in, 341.
to declare or lead uses, 400, 401.
voluntary, 350.
warranty in, 342.
witnesses to a, 348.
under Settled Lands Acts, 525, 527.

Deeds and wills,
distinctions between, 159.

Defacement of deed, 349.

Defeasance, 372, 385, 386, 428.

Defectum sanguinis, 303.

Deforciant, 393.

Dehors, evidence, 351.

De la plus belle,
dower, 180 n.

Delictum tenentis, 306.

Delivery
of a deed, 347.

Demandant, 398.

Demesne lands, 140, 435.
under Settled Land Acts, 524, 525, 530.

Demesne, seisin in, &c., 154.

Demise, 344, 481.

Demi-vills, 87.

Deodand, 469.

Deposit,
mortgage by, 218.
in case of registered land, 554.

Derby,
earls of, 65.

Dereliction,
lands acquired by, 314.
property lost by, 106, 314.

De religiosis, statute, 317.

Derivative conveyances,
distinguished from primary, 364.

Descendants, 291 n.

Descent,
origin of, 124.
in feuds, 125.
freeholds, 278.
copyholds, 445.
breaking the, 298.
before Inheritance Act, 279 n.
since Inheritance Act, 279 *et seq.*
tables of, 279.

Descent, canons of,
from purchaser, 280.
preference of males, 287.
primogeniture, 287.
representation, 288.
lineal ancestors, 290, 291.
paternal preferred to maternal, 291.
half-blood admitted, 293, 295.
from last person entitled, as *quasi* purchaser, 296.
as regards trust estates, 274, 275.

Descent, customs of, 445.

Descent or purchase, 240, 277.

Descents, statutory,
under Conveyancing Act, 1881, 274.
under Land Transfer Act, 1897, 275.

Determinable,
fee simple, 420.

Determination,
of estates at will, 196, 197.
prior estates, 238, 240.

Devisee,
liability of, for debts, 299.

Devisee and heir,
distinction between, as to emblements, 200.
and as to remainders, 238.

Devises,
generally, 409 *et seq.*
fraudulent, 299.
executory, 426.
of copyholds, 448.
history of, 409.
New Wills Act, 411 *et seq.*
solemnities of, 412.

Devises—*cont.*
construction of, 417.
operation of, 409 *et seq.*
by married women, 412.
residuary, 422.

Digest, Justinian's, 17.

Dignities,
descent of, among females, 288.

Diocese, 80.

Directory part,
of law, 14, 15.

Disabling statutes, 40.

Disafforestment, 472.

Discharge.
of deed, 351.

Disclaimer,
of estate, 335.
by married woman, 335.
none by heir-at-law, 335.
of tenure, 325, 437.
powers, 388.
beneficial estates, in part, 336.
trust estates, in part, 336.

Discontinuance,
of estate tail, 324, 397.

Disentailing deed, 166, 401.

Disgavelling Act, 138.

Disparagement,
of ward, 126.

Dispensing with husband, 408.

Displacement,
of reversion, 358.
remainder, 358.

Disseisin, 225, 358.

Distress,
for rents, 481.
on fixtures, 207.

District councils,
water supply by, 519 n.

Disturbance,
of easement, 466.
fair, ferry, or market, 470.

Disuse, 495.

Divesting,
of reversion, 358.
remainder, 358.

Divided parishes, 85.

Divine service,
tenure by, 150.

Divisible services, 256.

Divisions,
of counties, 89.

Divorce,
effect of, on dower, 178, 179.

Doctor and Student,
treatise known as, 30.

Dom-Boc
of Alfred, 21.

Domesday Book, 119.

Dominium, *directum*, 153.

Don grant et render, *fine sur*, 395.

Donis, *statute de*, 161.

Dos (or dower), 178.

Dos rationabilis, 185.

Double aspect, 235.

Double fines, 439.

Double possibility, 236.

Double succession duty, 566.

Double value,
of marriage, 127, 135.

Double voucher, 399.

Dower,
at common law, 178, 181.
by particular custom, 178.
in copyholds, 436.
assignment of, 181.
alterations in law of, 184.
ad ostium ecclesiæ, 180, 184, 185 n.
de la plus belle, 180 n.
ex assensu patris, 180.
out of what hereditaments, 179.
how barred, 182.
in reversion, 227.
remainder, 234.
trust estates, 273.

Dower Act, 1833, 184.

Dower, action of, 181.

Dowress,
not protector of settlement, 404.
not within Settled Land Act, 1882, 517.
within Settled Estates Act, 1877, 539.

Duress,
of imprisonment, 97, 102.
per minas, 97, 98.

Durham,
county palatine of, 91, 92.
Court of Pleas of, 92.
university of, 8.

Durities, 97.

Duties, 95.

Duties, death, 563 *et seq.*
estate, 569.

"Duty in arrear," 572, 573.

Dyer's Reports, 29.

"Dying without issue,"
in a devise, 424.
bequest, 427.

E.

Easement,
generally, 456, 457.
in gross, 465.
creation of, 486, 525, 531, 540.
by prescription, 493.

East India Company,
constitution of, 74.
dissolution of, 76.

East Indies, 74.
Acts relating to, 78 n.

Ecclesiastical Divisions, 79.

Ecclesiastics,
alienation by, 331.

Edward the Confessor,
his laws, 22, 23, 120.

Ejectment,
action of, 226.

Ejusdem generis,
construction, 352.

Election,
as to jointure, 182, 183, 186.
to purchase fixtures, 205.
in partition by coparceners, 253.

Elegit,
estate by, 222.
writ of—
against freeholds, 222, 223.
copyholds, 440.
attornment upon, 329.

Elopement and adultery, 178, 179.

Ely, isle of, 93.

Emblements, 171, 193, 199.

Empress of India,
title of, 77, 78.

Enabling statutes, 40.

Enclosure commissioners, 463.

Enfranchisement,
of copyholds, 441, 453.
voluntary, 454.
compulsory, 454.
expenses, charge for, 454.
mines, in case of, 454.
under Settled Land Act, 518, 529.
effect of, 454.
title to make, 501.
of slaves, 74.
villeins, 142.

England,
laws of, 1.
divisions of, 79.
ecclesiastical, 79.
civil, 85.
countries subject to, 50.

English laws,
when in force in a colony, 67 *et seq.*

Enlargement of base fee, 404.

Enlargement of term,
into fee simple, 512.

Enlarger l'estate,
release by way of, 364.

Enlarging statutes, 40.

Enrolment,
of bargain and sale, 374, 375, 402.
disentailing deed, 166, 402.
gift in mortmain, 321, 323.
deed dedicating land for gardens, &c., 525, 530.

Entails,
origin of, 160, 161.
varieties of, 162, 163, 400.
equitable, 405, 450.
bar of, by recovery, 165, 399.
fine, 166, 396.
disentailing deed, 166.
no merger of, 228, 229.
effect of judgments on, 167.
not within 3 & 4 Will. IV. c. 104. 167.
half-blood in, 294.
in copyholds, 436.
incorporeal hereditaments, 485.
money to be turned into land, 406.
quasi, 312.
ex provisione viri, 400.
after possibility of issue extinct. 174, 400.
where reversion in crown, 400.
devise of, when no lapse, 422.

Entireties,
tenants by, 245.
husband and wife no longer, *inter se*, 246.

Entirety of interest, 242.

Entry,
of heir, 297, 427.
devisee, 427.
lessee, 193, 360.
lord, 302.
issue, 162.
on breach of condition, 213, 214.
or of covenant, 214, 351, 508, 528, 540.
to avoid fine, 396.
right of, 225, 226, 239, 330, 358. 508, 528, 540.
not required on bargain and sale, 377, 380.

Entry and demise, 481.

Entry and feoffment,
release by way of, 366.

Entry on court rolls, 449.

Enuring, 231, 232.

En ventre, 96, 97, 238, 389.

Equality of exchange, 523, 526.
partition, 523, 526.

Equitable,
dower, 180.
estate, 450.
estate tail, 405, 450.
mortgage, 218.
waste, 170.

Equity,
origin of, 48.
business of, 49.
lease in, 195.
use in, 263.
trust in, 267.

Equity, court of, 263, 267.

Equity of redemption, 219.

Equity of statute, 42.

Error, writ of,
from Ireland, 61.

Escheat,
nature of, 117, 302.
none of the old use, 262.
of trust estate, 271, 273.
propter defectum sanguinis, 303.
propter delictum tenentis, 306.
title by, 302.
under Intestates' Estates Act (1884), 310.
not now valued in, upon enfranchisements, 455

Escheat and forfeiture,
distinguished, 307.

Escrow, 347, 348.

Escuage, 131, 132.

Estate,
definition of, 151.
distinguished from a possibility, 151.
from a power, 151.
at sufferance, 198.
will, 196.
conventional, 168.
by elegit, 222.
statute merchant, 221.
statute staple, 221.
the curtesy, 175.
for life, 168.
years, 188.

Estate—*cont.*
from year to year, 194.
in antient demesne, 146.
common, 254.
coparcenary, 250.
dower, 178.
expectancy, 225.
fee simple, 154, 436.
fee tail, 140.
joint tenancy, 243.
possession, 225.
remainder, 229.
reversion, 226.
merely legal, 174.
not of inheritance, 168.
of inheritance, 151.
on condition expressed, 212.
implied, 211.
particular, 226.
pur autre vie, 168.
tail *ex provisione viri*, 400.
upon condition, 211.

Estate by itself, 571, 575.

Estate clause, 497.

Estate duty, 569 *et seq.*
settlement, 574.
temporary, 569.
rates of, 569, 570.

Estate and power, 423, 424.

Estate, privity of, 365, 369.

Estate tail, 160, 400, 639.

Estates, settled, 516, 539.

Estoppel, 337.

Estovers,
rights of particular tenants to, 169.
common of, 461.

Eviction, 362, 363.
apportionment of rent on, 483.
in case of jointure, 182.

Evidence *dehors*, 351.
of recovery, 502.

Ex assensu patris, dower, 180.

Ex provisione viri,
estate tail, 400.

Ex speciali gratiâ, 432.

Examination,
for call to bar, 7, 8.

Excepted estates, 550, 552, 556, 557.

Exceptions,
from Mortmain Acts, 321.

Excessive bail, 101.

Exchange of lands, 362.
under Inclosure Acts, 363, 463.
Settled Land Acts, 518, 526.
by parsons, 362.

Execute the use, 264.

Execution of deed, 346.

Execution, writ of,
against freeholds, 222, 223.
copyholds, 440.
fixtures, 207.
lessee, 509.

Executor,
estate in, 223, 274, 555, 571, 574.
what fixtures go to, 202.
emblements go to, 200.
as witness to will, 416.
estate duty,
when paid by, 571, 572.
charge for, 573.

Executory,
devises, 426.
remainders, 385, 426.
trusts, 269.
uses, 385, 426.
destruction of, 390.
barring of, 399.

Exile, 103.

Expectancy,
estates in, 225.

Expenses,
of enfranchisements, 454.
sales, 503.

Expiring laws,
continuance of, 48.

Express,
warranty, 343.
use, 260, 381.

Extinguishment
of common, 464, 494.
copyhold, 454.
incorporeal hereditaments, 464, 494.
heriots, 455.

Extinguishment—*cont.*
of long term, 511.
release by way of, 366.

Extraordinary conveyances, 428.

Extra-parochial places, 82.

Extra-territorial waters, 79 n.

Extravagantes,
communes, 18.
Johannis, 18.

Eyots, 315.

F.

Factum or deed, 337.

Failure,
of issue generally, 424, 427.

Fairs and markets, 469.

Falkland Islands,
Acts relating to, 70 n.

False date, 345.

Farm (or *feorme*), 360.

Farm-house, 525.

Fasciculus of Acts, 44.

Fealty, 115, 119, 227, 436.

Fear, 97, 102.

Fee, 153, 417.
base, 162, 403.

Fee farm rent,
meaning of word, 480.
mode of creating, 480.

Fee on fee, 384, 385, 426, 437.

Fee simple,
what it is, 154.
how created, 156.
in a will, 420.
abeyance of, 156.
varieties of, 157.
absolute, 158.
qualified, 158.
conditional, 158, 436.
determinable, 420.
defeasible, 385, 426, 437.
prescription under, 490, 493.

Fee tail,
what it is, 160.
origin of, 160, 161.
varieties of, 162.
special, 162.
general, 162.
male, 163.
female, 163.
how created, 163, 496.
how held, 164.
evil effects of, 164, 165.
decline of, 165.
barring of, 165.
leases derived out of, 166.

Felony,
of trustee, 309.
new, 308.

Felony Act (1870), 309.

Female wards,
marriage of, 126.

Feme covert,
conveyance by or to, 392 *et seq.*
will of, 412.
as trustee, 274.
bare trustee, 274.

Feodum,
militare, 124, 125.

Feoffee, 354.

Feoffee to uses, 260, 319, 374.

Feoffment, 354.
by a lunatic, 333.
forfeiture by, 316, 324.
in gavelkind, 37, 139.
must be by deed, 154.
operation of, by wrong, 228, 234.
to uses, 374.
writing required for, 152.
tortious, 228, 234, 325, 388.

Feoffor, 354.

Feorme, 360.

Feræ naturæ, 209, 471.
being domesticated, 209.

Ferries, 469.

Feuda, 118, 153.

Feudal system,
origin of, 113.
introduction of, into England, 119.
hardships of, 132, 133.

Feuds,
origin of, 113.
nature of, 114.
utility of, 115.
grant of, 115.
incidents of, 116.
varieties of, 118.
honorary, 118.
introduction of, into England, 119.

Feudum,
antiquum, 281.
apertum, 302.
improprium, 118.
individuum, 288.
maternum, 290, 291, 298.
militare, 124.
novum, 281, 290.
novum ut antiquum, 282, 290.
paternum, 282, 290.
proprium, 118, 327.

Fiduciary position,
of tenant for life, 525.

Fief, 113.

Fief d'haubert, 123 n.

Fine,
to bar dower, 183.
nature of, 393.
varieties of, 394.
effect of, 395.
with proclamations, 395, 396.
discontinuance by, 397.
forfeiture by, 397.
non-claim on, 396.
by married women, 393.
tenant in tail, 166, 393, 394.
on alienation, 116, 130, 137, 146, 328, 329, 438.
in copyholds, 146, 438.

Fines and recoveries, 392.
abolition of, 401.

Fines and Recoveries Act, 397, 401.

Fire-bote, 169, 193.

First fine, 394.

First fruits, 129.

Fish,
property in, 476.

Fisheries, 475.

Fitzherbert's Abridgment,
references to, 30.

Fixed fines, 146.

Fixtures, 201.

Fleta, 30.

Flogging, 99.

Foot of a fine, 394.

Foreclosure, 219, 220.

Foreign dominions, 68.

Foreign Jurisdiction Acts, 68.

Foreigners, 79 n.

Foreshore, 79.

Forest,
franchise of, 471.
laws of, 472.

Forfeiture,
incident to feuds, 117.
on alienation, 316.
none of the old use, 262.
in copyholds, 446.
of estates tail in possession, 116.
in mortgages, 217, 218.
of equity of redemption, 220.
trust estates, 271, 273.
to Crown, 307.
lord, 437, 441.
by misuser, 470, 495.
non-user, 470, 495.
relief from, 508.
in case of leases, 508.
remission of, 310, 319.
on attainder, 306.
title by, 316.

Forfeiture and escheat,
distinguished, 307.

Formam doni, secundum, 162.

Formedon, 397.

Former estate, 214, 325, 383.

Fortescue, 7.

Fowls of warren, 474.

Fraction of time, 189, 190.

Franchises, 468, 473.

Frank tenement, 152.

Frankalmoign, 149.

Frankmarriage,
gift in, 251.
is in tail special, 162.
hotchpot in, 251.

Frater fratri uterino, &c., 294.

Frauds,
statute of, 151, 192, 273, 299, 313, 347, 356, 360, 365, 368, 371, 378, 413, 415.

Fraudulent attornment, 329.

Fraudulent devises,
statute of, 299.

Free fishery, 475.

Free pledges, 85.

Free services, 122.

Free socage, 133.
character of, 134.
incidents of, 134, 136.

Free warren, 474.

Freebench, 436.

Freehold,
generally, 152.
by wrong, 388.
customary, 146, 148.
in abeyance, 156.
in futuro, 231, 263, 330, 383, 425, 437.
in remainder, 229, 234.

Freehold estate,
of inheritance, 153.
not of inheritance, 153.

Freehold lands,
registration of, 546, 551.

Freehold tenure, 133.

Frontagers, 491.

Fructus industriales, 199.

Fruit trees, 172, 201.

Futuro, estates *in*, 231, 263, 330, 383, 425, 437.

G.

Game, 474.

Gavelkind, 31, 33, 138.
curtesy in, 175.
dower in, 178.
descents in, 250, 288.

General commutations, 451.

General Inclosure Act, 363, 462, 463.

General power, 423, 424.

General Vestry Act, 83.

General words, 352, 497.

Gestation, period of, 389.

Gift of lands, 357.
to charities, 319, 320.
by deed, 321.
will, 323.

Glanville, 29.

Good consideration, 350.

Goods and chattels, 187.

Governor,
of colony, 67.

Governor-General,
of India, 75, 77.

Graduated duty, 570.

Grand coustumier,
of Normandy, 66.

Grand serjeantry, 131.

Grant,
at common law, 358.
to uses, 879.
now conveyance, 380.
of incorporeal hereditaments, 358.
copyholds, 447.
waste, 448.

Grant, Royal, 430 *et seq.*

Grantee of reversion, 214.

Grantee to uses, 260, 497.

Grass, 172, 201.

Gratian's decree, 18.

Great charter, 38, 317.

Great seal, 430, 431.

Great session,
courts of, 52.

Greenwich,
market, 471.
time, 188.

Gregory's decretals, 18.

Gross,
common in, 460.
villein in, 141.

Ground game, 474.

Growing crops, 200.

Guardian,
in chivalry, 125.
copyhold, 145.
socage, 134.

Guernsey, 56.

H.

Habeas Corpus, 101.

Habeas Corpus Act,
provisions of, 101.
suspension of, 102.

Habendum, 341.

Hæreditas nunquam ascendit, 290.

Half-blood, 292.
former exclusion of, 293, 294.
new rule as to, 295.

Hamlet, 87.

Hares,
beasts of warren, 474.

Hawkins,
Pleas of the Crown, 30.

Hay-bote, 169, 193.

Headborough, 86.

Health,
injuries affecting, 100.

Hedge-bote, 169.

Heir,
apparent, 278.
presumptive, 278.
is a word of limitation, 156, 295.
when he takes by purchase, 286.
is liable to ancestor's debts, 275, 300, 313, 440.
cannot disclaim, 335.
customary, 445.

Heir and devisee,
distinguished as to emblements, 200.
and as to remainders, 238.

Heir, entry of, 297, 427.

Heir of the body, 163, 639.

Heirlooms, 208.
sale of, 538.

Heligoland,
Acts relating to, 70 n.

Hereditament,
meaning of, 111.
corporeal, 112.
incorporeal, 112.

Heriot, 145, 439, 455.

Heriot custom, 439.

Heriot service, 439.

High seas, 79.

High-water mark, 79.

Highways, 465.

Hiis testibus, 348.

Hobhouse's Act (1827), 84.

Holding over,
by tenant, 198.

Homage, 116, 453.

Homicide, 96.

Hong Kong,
Acts relating to, 70 n.

Honor, 140.

Honorary feuds, 118, 288.

Hotchpot, 251, 252.

House-bote, 169, 193.

House of Keys, 64.

Hundred, compensation by the, 88.
division of counties into, 87.

Husband and wife, 245, 246, 383, 407.

I.

Id certum est,
quod certum reddi potest, 36, 191.

Idiots,
conveyances by, 333.

Illegal condition, 215.

Illegal consideration, 350.

Immediate descent, 292, 293, 307.

Immediately, 321 n.

Immemorial usage, 24, 435, 488.

Imparl, 398.

Impeachment of waste, 170.

Imperfect and perfect,
tenures are, 164, 169.

Imperial constitutions, 17.

Imperial Titles Act (1876), 77, 78.

Implication of estate, 257, 418.

Implied condition, 211.

Implied covenant, 344, 497, 498.
in case of registered land, 554, 555, 557.

Implied cross remainders, 257, 418.

Implied estate, 418.

Implied powers,
in mortgages, 500.
of registered land, 555.

Implied trust, 269.

Implied use, 381.

Implied warranty, 343.

Impossible condition, 215.

Impossible date, 345.

Imprisonment,
duress of, 97, 102.

Improper feuds, 118.

Improved value, 146.

Improvement of Lands Act (1864), 519.

Improvements, Settled Land Acts, 519, 532.
scheme for, 532.

In,
of old estate, 214, 325, 383.
by descent, 254.

In alieno solo, 461, 474.

Incerti temporis,
statutes, 38 n.

Inclosure Acts, 363, 462, 463.

Inclosure commissioners, 463.

Inclosure of common, 462.

Inconsistent,
customs must not be, 37.
clauses in deeds, 352.
wills, 418.

Incorporeal hereditaments,
nature of, 112, 456.
are tenements, 112.
are hereditaments, 456.
extinction of, 464, 494.
how conveyed, 486.

Indefinite failure,
of issue, 424, 427.

Indemnity,
in case of registered land, 558.

Indenting, 320 n.

Indenture, 338.

Index of proprietors, 549.

Index of pending applications, 549.

Index map, 549.

India,
acquisition of, 74.
Acts relating to, 78 n.
imperial assumption of, 76.
Governor-General of, 77.
council of, 77.
bishops of, 75, 76.
mutiny in, 76.
presidencies of, 75.
secretary for, 77.

Indivisible services, 256.

Induction,
to a benefice, 355, 362.

Infants,
conveyances by and to, 333, 334.
feoffment of, 37, 179.
provisions of Conveyancing Act (1881) regarding, 513.
provisions of Settled Land Act (1882) regarding, 516, 517.

In futuro,
estates, 231, 263, 283.

In gross, common, 460.

Inheritable blood, 117, 281 *et seq.*

Inheritance,
canons of, 279 *et seq.*
collateral, 281, 292, 295.
copyhold of, 435.
estates of, 151.
words of, 156, 295.

Inhibitions, 557.

Initiate,
tenant by curtesy, 176, 177.

Injury,
civil, 95.

Innocent conveyances, 388, 389.

Innocent the Fourth, 5.

Inns,
of Chancery, 6, 7 n.
Court, 6, 6 n.

Inops consilii, 417.

In pais, matter, 354.

In pari materiâ,
statutes, 44.

In proprio solo, 461, 474.

Inquisitio post mortem, 126.

Inrolment,
of bargain and sale, 376.
disentailing deed, 401.
gift to charity, 321.
deeds dedicating gardens, &c., 525, 530.

Insane persons,
conveyances by and to, 333, 405.

Inspection,
of title deeds, 515 n.
register, 556.

Instalment,
in dignities, 355, 362.

Instalments, payment by,
of succession duty, 565, 572, 573.
estate duty, 572, 573.

Institutes,
of Gaius, 17 n.
Justinian, 17.

In suo solo, 461, 474.

Insurance fund,
in case of registered land, 559.

Insure, 221.

Intercommoning, 559.

Interesse termini, 193, 360, 365.

Interest,
on duty, 572.
in arrear, 572.

Interest of witnesses to will, 414, 416.

Interests in expectancy, 574.

Interests, reversionary, 242.

Interlineation,
of a deed, 349.
will, 416.

Interpretation Act (1889), 38, 48, 64, 66, 189, 429.

Interpretation of statutes, 40, 41.

Interruption,
of right, 35, 466, 492.

Intruder, 198.

Inventions,
patents for, 431, 432.

Investments, 535.
variation of, 537.
of charitable funds, 320.
capital moneys, 534, 537.

Ireland,
acquisition of, 58.
independence of, 61.
laws applicable to, 59 *et seq.*
Act of Union, 61, 62.

Irish Church,
disestablishment of, 62 n.

Islands,
adjacent to Great Britain, 63.
Channel, 66.
rising of, in the sea, 314.
in a river, 314.

Isle of Man, 64.
statutes relating to, 64 n.

Isle of Wight, 63.

Issue,
dying without, words of, 424, 427.

J.

James I.,
his canons, 20.

Jersey, island of, 66.

John of Gaunt, 92.

Joint tenancy,
nature of, 243, 244, 263.
how dissolved, 247.

Jointure, 182, 244.

Joint use, 263.

Judgment,
elegit upon, 222, 440.
against estate tail, 167.

Judicature Acts,
for England, 49, 92, 221.
Ireland, 63.

Judicial declaration,
of title, 560.

Judicial notice, 39, 429.

Judicial separation,
effect of, on dower, 179.
on jointure, 183.

Jura regalia, 90, 93.

Jurats, 66.

Juris scintilla, 266.

Jus accrescendi, 247, 250, 254.
prefertur oneribus, 247.
prefertur ultimæ voluntati, 248.

Jus gentium, 11.

Justinian, laws of, 17.

K.

Kent,
gavelkind in, 31, 33, 138, 175, 178, 250.

Keys, House of, 64.

King, grant by, 430 *et seq.*

Knight of the shire, 89.

Knight service tenure,
character of, 124.
incidents of, 125.
oppressions of, 132.
abolition of, 133, 411.

Knighthood, 126.

L.

Lancaster,
county palatine of, 91, 92.
Court of Common Pleas of, 92.

Land,
meaning of the term, 110.
origin of property in, 105 *et seq.*
holden of crown, 121.

Land certificate,
grant of, 550.
deposit of, 554.
endorsements on, 557.

Land charges,
definition of, in Act (1888), 545 n.
registration of, 479, 545.

Land Charges Registration and Searches Act (1888), 544, 545.

Landlord and tenant,
fixtures as between, 203.

Land registry, 479, 543.

Land Transfer Acts (1875—1897), 546 *et seq.*

Land Transfer Act (1897),
title of representative under, 223, 274, 555, 571, 574.
sale of real estate, 301.

Lands Clauses Consolidation Act (1845), 108 n.

Lapse,
of devise, 421.
what devises do not, 422, 423.

Latent ambiguity, 351.
entail, 165.

Lathes in Kent, 88.

Law,
definition of, 10.
varieties of,—
canon, 17, 19, 25.
civil, 3, 16, 17, 25.
common, 23.

Law—*cont.*
varieties of—*cont.*
divine, 10.
merchant, 32.
municipal, 11.
of nations, 11.
nature, 10.
revelation, 10.
Roman, 3, 17.
statute, 38.
unwritten, 20.
written, 38.

Law and equity,
fusion of, 49.

Laws in general,
law of nature, 10.
revelation, 10.
nations, 11.
municipal law, 11.

Laws of England,
importance of the knowledge of, 1.
rivalry between, and civil and canon laws, 3 *et seq.*
study of, in London inns, 5, 6.

Le grand coustumier, 66.

Leading the uses,
of fine or recovery, 400.

Leap year, 188.

Lease, 357.

Lease and release, 372, 378.

Leaseholds, 422, 423.

Leasehold lands,
registration of, 548, 551.

Leases,
in writing, 357.
by deed, 360.
operative words in, 360.
covenants in, 361.
practice as to preparing, 340 n.
by tenant for life, 171.
tenant in dower, 539.
tenant by the curtesy, 539.
husband of wife's lands, 539.
tenant in tail, 166, 167, 539.
under Settled Land Acts, 518, 527.
in futuro, 359.
long, 540.
forfeiture of, 361.
of copyholds, 441, 442.
under Settled Estates Act, 539 *et seq.*

Leasing powers,
implied, 500.
under Settled Land Act, 518, 527.

Leeward Islands,
Acts relating to, 70 n.

Legacy duty, 563.

Legal estate, 174.
outstanding, 505.
got in, by registration, 546, 549.

Legal memory, 24, 34, 488.

Legal personal representative,
descent into, 274, 275, 554, 555, 574.
implied covenant by, 498.

Legal waste, 170.

Legatine constitutions, 18.

Leges posteriores, priores abrogant, 47.

Leges scriptæ, 38.

Letter of statute, 41.

Letters close, 430.

Letters patent, 430.

Levant and *couchant*, 460.

Lex mercatoria, 32.

Lex non scripta, 20.

Lex scripta, 20.

Liabilities,
which are not incumbrances, 553, 556.

Liber judicialis,
of Alfred, 21.

Liberties,
merger of, in counties, 89.

Liberties and franchises, 468.

Liberty, personal, 100.

Liberum tenementum, 152.

Licence,
to alienate copyholds, 441, 455.
assign, 510.
demise copyhold, 441, 518.

Licence—*cont.*
to hold in mortmain, 259, 316, 319, 322.
is usually revocable, 151.

Licentia concordandi, 393.

Life,
right to, 96.

Life, estate for,
conventional, 168.
legal, 174.
under Settled Land Act (1882), 516, 517.

Light, 467, 493.

Limbs,
defence of, 97.

Limitation or purchase, 240, 241.

Limitation, conditional, 212.

Limitation, Statutes of,
as regards mortgages, 219.
generally, 226, 248, 344, 356.

Limitation to uses, 260, 381.

Limited Owners,
Residences Act (1870), 519 n.
Reservoirs, &c. Act (1877), 519 n.
Settled Land Act (1882), 516 *et seq.*

Lineal ancestors,
admitted to descent, 290, 291.

Lineal descent, 286.

Lineal warranty, 343.

Lis pendens, 544.

Livery,
in deed, 356.
law, 357.
lying in, 359, 486.
of seisin, 152, 355.
or *ousterlemain*, 125.

Local and personal Acts, 39.

Local authorities,
gifts of land to, 323.
sales of land by, 558.

Local Government,
board, 332.

Local Government (Ireland), 63.

Locke King's Acts, 219.

London,
customs of, 32, 34.
proof of, 34.
ancient lights in, 467.
University of, 8, 9 n.

London, County of,
registration of title in, 547.

Long terms, 190, 191, 510.
cesser of, 510.
extinguishment of, 510, 511.
enlargement of, 512.

Lord of Manor,
consent of, to inclosure, 464.

Lordships, 139.

Loss,
of land certificate, 558.

Lot Meads, 460.

Lots,
sale in, 504.

Low water mark, 79.

Lunar month, 189.

Lunatics,
under Settled Land Acts, 517.
sales by and to, 333.
bar of estate tail of, 405.
copyholds of, 446.

Lying in grant,
or in livery, 359, 486.

Lying in *prendre*,
or in render, 476.

M.

Magna Charta, 38, 317.

Maiming, 97.

Maintenance,
of infants, 514.
improvements, 533.

Mala grammatica, 351.

Mala praxis, 100.

Males,
preference of, in descent, 287.

Malus usus,
abolendus est, 34.

Man, island of, 64.

Mandamus,
to compel admittance, 444.

Manors, 139.

Mansion House, 525, 530.

Manumission,
of villeins, 142.

Map,
index, 549.
ordnance, 550.

Marginal notes,
to statutes, 45.

Mark,
signing deed by a, 346.

Market, fair, and ferry, 469.

Market gardens, 206.

Market towns, 86.

Marriage,
in chivalry, 126.
socage, 135.
effect of, on joint tenancy, 249.
revokes will, 416.

Married woman,
separate estate of, 177.
surrenders by, 449.
as bare trustee, 274.
ordinary trustee, 274.
conveyance by, 334.
will of, 412.
as tenant for life under Settled Land Acts, 517.
as protector of settlement, 405.

Married Women's Property Acts, (1882, 1893), 246, 274, 412.

Master of the Rolls,
custody of records, 26 n.

Maternal line of descent, 291, 292.

Mauritius,
Acts relating to, 70 n.

Maxims, 23, 26.

Mayhem, 97.

Members of Parliament,
for Wales, 52.
Scotland, 54.
Ireland, 62.

Memory,
time of legal, 24, 34, 488.

Menaces, 97.

Mercen-lage, 22.

Merchant laws, 32.

Merchant, statute, 221.

Merchants, custom of, 32.

Mere power, 151.

Merger,
of term in freehold, 228, 234, 368.
in term, 229, 368.
of trust estates, 272.
fee simple conditional, 229.
none of estate tail, 228, 229.
how affected by Judicature Acts, 229.
of simple contract in specialty, 337.

Merton,
statute of, 4, 462.

Mesne lords, 122, 317, 319.

Middlesex,
registration in, 543, 544.
of title in, 552.

Midnight,
payment before, 189, 482.

Military,
feuds, 124, 125.
tenures, 133, 411.

Minas,
duress *per*, 97.

Mines,
in copyholds, 437.
on enfranchisement, 454.
enlargement of term, 513.
registration of title, 547, 548.

Minimum rent. 529.

Mining leases, 518, 528.

Mining rent,
apportionment of, 532, 541.
minimum, 529.
varying, 529.

Minor fine, 394.

Mirrour, The, 30.

Miscarriage,
procuring, 97.

Mischief and remedy, 43.

Misuser,
forfeiture for, 211, 497.

Mitter le droit, 366.

Mitter l'estate, 366.

Modus legem dat donationi, 355.

Modus levandi fines (18 Edw. 1.), 393.

Money into land,
given to charity, 324.
tail in, 406.
bar of, 406.

Monk, 98.

Monster,
cannot be heir, 303.

Month,
calendar, 189.
lunar, 189.

Monthly letting, 196.

Mortgage,
legal, 217.
equitable, 218.
in case of registered land, 554.
of fixtures, 203.
statutory, 499, 500.
consolidation, 515 n.
transfer, 515 n.

Mortgagee,
his estate, 218.
powers, 218, 221.

Mortgagor,
his equity of redemption, 218, 219.
powers, 221.
covenants by, 345.

Mortmain, 258, 316, 321.

Mortmain Acts,
history of, 316 *et seq.*
provisions of, 320.
relaxations of, 322, 323.
exceptions to, 319, 323, 324.
alienation under, 322, 323.

Mortuâ manu, 258.

Mortuo vadio,
estate in, 217.

Mother churches, 80, 81.

Mulier puisné, 304.

Multiplication of charges, 538.

Multiplication of heriots, 440.

Munera, 114, 114 n.

Municipal corporations, 86, 323.

Municipal law,
is a rule, 11.
of civil conduct, 11.
prescribed by sovereign, 11, 12.
is either (1) declaratory, 14.
or (2) directory, 14, 15.
(3) remedial, 14, 15.
of England, 56.
Scotland, 56.

Mutual conveyances, 363.

N.

Nations,
law of, 11.

Nativi, 142.

Natural affection, 375.

Natural death, 98, 99.

Natural liberty, 100.

Natural life, 99.

Naturalization, 306.

Naturalization Act (1870), 306, 335.

Nature,
law of, 10.

Navigable rivers, 475.

Ne exeat regno,
writ of, 103.

Necessary sustenance, 98.

Necessity, way of, 465.

Neife, 142.

Nemo est hæres viventis, 278.

New appointment, 386, 387.

New Brunswick,
Acts relating to 70 n.

New felonies, 308.

Newfoundland,
Acts relating to, 70 n.

New South Wales,
Acts relating to, 70 n.

New Zealand,
Acts relating to, 70 n.

No fee on fee, 384, 385.
unless executory, 385.
or unless alternative, 385.

Nominal rent, 322, 512 n.
consideration, 378.

Non-claim,
bar by, 396.

Non-commonable beasts, 458, 459.

Non compos, 333, 405, 446, 517.

Non-user,
forfeiture for, 495.

Norfolk Island,
Acts relating to, 70 n.

Norman conquest, 23.

Norman jurisprudence, 23.

North sea,
fisheries 79 n.

Not incumbrances,
incidents which are, 553, 556.

Note of a fine, 394.

Notice,
to pay off mortgage, 218.
quit, 195,
repair, 509.
under Agricultural Holdings Act, 196.
under Settled Land Acts, 521, 522.

Notices, 557.

Not of inheritance,
estates which are, 168.

No use upon a use, 384, 385.

Nova Scotia,
Acts relating to, 70 n.

Nova statuta, 38 n.

Novels of Justinian, 17.

Nullius filius, 304.

Nullum Tempus Act,
in colonies, 67 n.

Nullus clericus,
nisi causidicus, 2.

Nullus liber homo,
destruatur, 99.

O.

Oath of fealty, 115, 119, 227.

Obligation of laws, 11, 12.

Obliterations in wills, 417.

Occupancy,
colonies gained by, 66, 67.
common, 312.
special, 312, 313.
title by, 106, 311.

Office, 211.

Office copy,
of registered lease, 551, 554.

Office of Land Registry, 479, 543.

Official certificate, 507, 559, 560.

Official search, 509, 559, 560.

Official trustee,
of charity lands, 323.
charitable funds, 320.

Old or former estate, 214, 325, 383.

Old use, 383.

Operation of law, 369.

Operation of statute, 41

Option of purchase
in lease, 528.

Order,
elegit on, 222, 223, 329, 440.

Orders and writs,
affecting land, 544, 545.

Ordnance survey, 53 n., 550.

Origin,
of common law, 23.
equity, 48.
property, 105, 106.

Original deed, 338.

Ostium ecclesiæ,
dower ad, 180, 184, 185 n.

Ouster, 225, 358.

Ousterlemain, 125.

Out of court, 453.

Outlawry,
attainder on, 309 n.

Outstanding terms, 510, 511.
legal estate, 505.

Owens College, 7, 8.

Ownership, potential, 314.

P.

Paid vestry clerk, 84.

Pais,
conveyances in, 354.
matter in, 354.

Palatine counties, 90.

Pandects, 17.

Pannage,
a species of common, 458.

Paper, 339.

Paramount, lord,
and mesne lord distinguished, 122.

Paravail, tenant, 122.

Parchment, 339.

Parceners,
generally, 250.
title of, after partition, 254.

Pardon,
effect on corruption of blood, 30.

Parish,
definition of, 80.
origin of, 80, 81.
boundaries of, 81.
common rights of, compensation for, 108, 464.
council, 558.

Park, 474.

Pars rationabilis, 185 n.

Parson,
emblements of, 172.
exchange by, 362.

Parte paternâ, ex, 291.

Parte maternâ, ex, 291, 292.

Partes finis, nihil habuerunt, 396.

Particular commutations, 451.

Particular customs, 31, 32.

Particular estate, 226.

Particular tenants, 324.

Parties,
to a deed, 340, 341.
fine, 395.

Partition,
of coparcenary, 252.
joint tenancy, 247.
of tenancy in common, 257.
suit for, 252, 257.
deed of, 253. 257, 363.
under Inclosure Acts, 463.
Settled Land Acts, 518, 526.
writ of, 248, 253.
of copyholds, 452.

Partridge,
a fowl of warren, 474.

Partus sequitur ventrem, 304.

"Passing on death," 569.

Passive trusts, 267.

Pasture, common of, 457, 462.
approvement against, 462.

Patent ambiguity, 351.

Patent rolls, 430.

Patents, 430, 431.

Paternal line in descent, 291.

Peaceable,
enjoyment of custom, 35.

Pecuniary consideration of bargain and sale, 375.

Peers of Ireland, 62.
Scotland, 54.

Penal servitude, 103.

Penal statutes, 40.

Penalty,
for not stamping deed, 339 n.

Peppercorn rent, 528.

Per capita, 289.

Percentage,
of legacy duty, 563.
succession duty, 565.
estate duty, 569, 570.

Perfect and imperfect,
tenures are, 164, 169.

Permissive waste, 170.

Per my et per tout, 245.

Pernancy of profits, 225 n, 264.

Perpetual rents,
creation of, 482, 526.
redemption of, 481, 505.

Perpetuity,
doctrine of, 389, 390, 426, 427.
leases in, 529.

Personal,
Act of Parliament, 39.
annuity, 478.
chattels, 109, 187.
estate, 109.
liberty, 100.

Personal—*cont.*
office, 404.
representative, 274, 498, 554, 594.
rights, 95.
security, 96.
things, 109.

Personal property, 109.

Personal rights,
personal security, 96.
personal liberty, 100.

Per stirpes, 289.

Per tout et non per my, 245.

Petit serjeanty, 137.

Petition of right, 100.

Petition to repeal patent, 433.

Pheasant,
a fowl of warren, 474.

Pickage, 470.

Pictures,
as heirlooms, 208, 209.
duty on, 571.

Piscary, common of, 461.

Pledge, estates in, 217.

Plough-bote, 169, 193.

Ploughland, 124.

Plowden's Reports, 29.

Policy of the law, 329, 330.

Poll, deed, 339.

Poor,
rate, 82.
laws, 82.

Poor livings,
augmentation of, 319.

Possessed or seised, 187, 188, 265.

Possessio fratris, &c., 294.

Possession,
estates in, 225.
naked, 225.
held over, 198.
right of, 225.
unity of, 245, 255.

Possessions, colonial, 66.

Possessory title,
registration with, 546, 550.

Possibility,
distinguished from estate, 151.
bare, 151.
common, 236.
coupled with an interest, 151, 330.
double, 236.
of reverter, 161, 229.
remote, 236.
upon a possibility, 236.
uses in, 263.

Possibility of issue extinct,
tail after, 174, 400.

Post fine, 394.

Posthumous child, 238, 389.
entitled as remainderman, 238, 389.
as heir, 238.

Potentia,
propinqua, 236.
remota, 236.

Potential ownership, 314.

Power,
distinguished from estate, 422.
to appoint, executed by devise, 422, 423.
special, 423.
general, 423, 424.

Powers,
of revocation and new appointment, 386, 387.
succession duty on, 566, 567.
release of, 388.
disclaimer of, 388.
of mortgagee, implied, 500.
tenant for life under Settled Land Acts, 517 *et seq.*
mortgagor, 500.
mortgagee, 500.
implied in mortgages, 500.
in case of registered land, 555.

Powers of attorney, 515 n.

Poynings' Laws, 59, 60.

Practice as to preparing deeds, 340 n.

Præcipe,
in a fine, 393.
a recovery, 398.
tenant to the, 393, 398.

Preamble,
of statute, 45.

Precedent, condition, 212, 215.

Predecessor and successor, 564.
generally, 563, 564.
rate of duty as between, 565.

Preferments,
exchange of, 362.

Preliminary bar examination, 7, 8.

Preliminary contracts, 503, 519, 531, 540.

Premises,
of a deed, 340.

Prendre and render, 476.

Prescription,
incorporeal rights acquired by, 487 *et seq.*
at common law, 488.
by statute, 491.
in a man and his ancestor, 489.
a *que* estate, 489.
liability by, 491.
commons by, 492.
easements by, 468, 493.
rights by, 468, 486, 487.

Prescription and custom,
distinguished, 486, 487.

Presentment,
by the homage, 453.

Presumptive heir, 278.

Primaria ecclesia, 81.

Primary conveyances,
distinguished from derivative, 364.

Primer fine, 394.

Primer seisin, 129, 137.

Primitiæ, 130.

Primogeniture, 287.

Prince of Wales, 51.

Prince of Wales' Island,
Acts relating to, 71 n.

Principal mansion house, 525, 530.

Principal value, 569.

Prior title, 503.

Private Acts, 39, 429.

Private estates of Crown, 434.

Private relations,
rights in, 95.

Privies to a fine, 395.

Privileged villenage, 123.

Privileges without profit, 456.

Privity of estate, 365, 368.

Privy seal, 430, 431.

Probate duty, 563.

Proclamations,
fine with, 394, 395.

Procreation, words of, 162, 163.

Production,
of *cestuis que vie*, 241.
title deeds, 499.

Profession, monkish, 98.

Profits *à prendre*, 456, 457, 492.

Profits in *alieno solo*, 456, 461, 474, 492.

Prohibition,
to leave the realm, 103.

Pro indiviso, 243, 247, 255.

Proper feuds, 118, 327.

Property,
origin of, 105, 106.
abandonment of, 106.
transfer of, 107.
personal, 109.
real, 109.
rights of, 95.

Property register, 549, 550.

Proprietorship register, 549, 550.

Propositus, 280, 296, 297.

Protection,
of purchasers and mortgagees, 568.

Protector,
of the settlement, 167, 403, 404.
in the case of copyholds, 449.

Province of an archbishop, 79.

Provincial constitution, 18, 19.

Provincial synods, 19.

Proviso
for cesser, 510.
re-entry, 361.

Public
Act of Parliament, 39, 429.
bar examination, 7.
museum, 323.
parks, 323.
rights, 95.

Publication of will, 413, 415.

Pur autre vie,
tenant, 168, 311, 313, 411.
rents, 486.

Purchase,
title by, 277.

Purchase deed,
execution of, 505, 506.
preparation of, 340 n.

Purchase or limitation, 240, 241, 277.

Purchaser,
blood of the, 117, 281, 283, 284.
by conveyance to self, 286, 296.

Purchaser—*cont.*
descent from the, 280, 485.
meaning of term, 277.
quasi, 296.

Purchaser's protection, 568.

Pure villenage, 123.

Purely incorporeal hereditaments, 456 *et seq.*

Purlieus, 472.

Q.

Quæ ipso usu consumuntur, 260

Qualified fees, 158.

Qualified title,
registration with, 546, 550, 552.

Quantity,
of estate, 152.

Quarantine,
the widow's, 181.

Quasi entail, 312.

Quasi purchaser, 296.

Que estate,
prescribing in, 489.

Quebec,
Acts relating to, 70 n.

Queen,
her claim to India, 76.
Empress of India, 77, 78.

Queen Anne's bounty, 319.

Queensland,
Acts relating to, 70 n.

Quia emptores,
statute of, 130, 154, 328, 342, 548.

Quicquid plantatur solo cedit, 201.

Quiet enjoyment,
covenant for, 344, 361.

Qui hæret in literâ, 351.

Qui prior est tempore,
potior est jure, 221.

Quit rents, 438.

Quod nullius est, 311.

Quod populus postremum jussit, id jus ratum esto, 47.

Quousque, seizure, 446.

R.

Rack rents, 480.

Raising money,
under and for purposes of Settled Land Acts, 523, 526, 527.

Rapes,
in Sussex, 88.

Rasure in a deed, 349.

Rate,
county, 90.
local, 90.
of duty, 570.

Rateable part,
of estate, for duty, 572, 573.

Reading of deed, 346.

Real action, 325.

Real chattels, 187, 188.

Real estate, 109.

Real property,
land, 110.
water, 110.
mines, 111.

Real property limitations, 219, 226, 248, 344, 356, 397.

Real Property Statutes, 151.

Real representative, 274, 275, 554, 555, 574.

Realm,
prohibition to leave, 103.

Realty, 109.

Reasonable custom, 36.
prescription, 489.
fine, 438.
toll, 470.

Receipt,
for rent, 501, 502.
purchase-money, 506.

Receiver,
under mortgage, 221.

Recitals,
in deed, 340.
abstracted documents, 502.

Recognizance, 221.

Recompense in value, 398.

Record,
nature of, 26.
conveyances by, 428 *et seq.*
estoppel by, 337.

Record office,
public, 26 n.

Recorder of London,
certificate of, 34.

Records and Writs,
transfer of, 26 n.
useless, destruction of, 26 n.

Recoveree, 398.

Recoveror, 398.

Recovery,
nature of common, 165, 318, 397.
mode of, 398, 399.
force of, 399.
abolition of, 401.
customary, 449.

Recovery in value, 398.

Recreation grounds, 320 n.

Rectification,
of disentailing deed, 404.
in case of registered title, 552, 556, 558.

Rector, 82.

Reddendum,
of deed, 342.

Redemption,
equity of, 219.
of rents, 481, 505.
certificate of, 481, 505.

Reditus,
meaning of the word, 118, 124.
albi, 480.
capitales, 480.
nigri, 480.
quieti, 438, 480.
sicci, 479.

Re-entry,
for breach of covenant, 214, 215, 351, 508, 528, 540.
note of, on register, 553.

Regardant,
villeins, 141.

Regiam majestatem, 53 n.

Register,
of writs and orders, 544.
deeds of arrangement, 544, 545.
land charges, 545.
charges, 549, 550.
Property, 549, 550.
Proprietorship, 549, 550.

Registered land,
mortgages of, 554.
transfers of, 556.

Registration,
of annuities, 478, 479.
conveyances, 542 *et seq.*
title, 543, 546 *et seq.*
compulsory, 546, 549.
of writs and orders, 543.
deeds of arrangement, 543, 544.
land charges, 479, 545.

Registration of title,
application for, 548.
general rules regarding, 549.
varieties of titles registered, 546.
registers, 549, 550.
effect of, 551, 556.
subsequent dealing with land after, 554—556.

Regno, ne exeat,
writ of, 103.

Regulation of common, 464.

Relation back,
of admittance to surrender, 446.

Release,
deed of, 351, 364.
effectual as a lease and release, 379.
of condition, 215.
powers, 388.
none under Settled Land Acts, 519.
extinction of incorporeal hereditaments by, 494.
from rentcharge, 526.
of incumbrances, 505.

Relief,
fendal, 116.
in copyhold, 145.
knight service, 128.
socage, 136.
case of leases, 508.
poor law, 82.

Religious houses, 258, 317.

Remainder,
definition of, 229.
varieties of,
contingent, 234, 382.
vested, 234, 381.
cross, 257.
none after fee simple, 238.
creation of, rules for, 232, 236.
displacement of, 241.
when treated as executory interest, 385.
purchase of, 571.

Remedial,
law, 14, 15.
statutes, 40.

Remission,
of forfeiture, 310.
escheat, 310.

Removal of fixtures, 204, 205.

Render and *prendre*, 476.

Renewable leases, 369, 370.

Rent,
nature of, 190, 476.
incident to reversion, 177, 479.
accrual of, 174.
apportionment of, 173, 483.
varieties of,
acreage, 529.
minimum, 529.
charity, 482.

Rent—*cont.*
varieties of—*cont.*
chief, 480.
nominal, 322, 512 n.
quit, 438, 480.
fee farm, 480.
minimum, 529.
peppercorn, 528.
perpetual, 481, 505.
varying, 529.
rentcharge, 526.
rent of assize, 480.
rack rent, 480.
rent service, 477.
rent seck, 479.
rentcharge, 478.
under Settled Land Acts, 526.
receipt for, 501, 502.
creation of, 482, 526.
redemption of, 481, 505.

Rentcharge,
on alienation in mortmain, 321, 322.

Repairs, 170.

Repeal,
of statutes, effect of, 46, 47.
obsolete statutes, 38 n.

Reports, law, 28, 29.

Representation,
in descents, 288.

Representative assembly,
peers (Scotch), 54.
peers (Irish), 62.
colonial, 68.

Repugnant,
clauses in a deed, 352.
devise, 418.
conditions, 215, 329, 330.
enactments, 43.
colonial laws, 72.

Reputation,
security of, 100.

Requisites of a deed, 340 *et seq.*

Re-registration, 558.

Reservation,
in gifts to charities, 321.
of rent, 486.

Residuary devise, 422.

Restraining statutes, 40.

Restraints on alienation, 215, 329.

Restrictive conditions, 555.

Restrictions, 557.

Resulting,
trust, 269.
use, 260, 381.

Retrospective,
operation of statute, 41.
relation of admittance, 446.

Revealed law, 10.

Reversion,
definition of, 226.
distinguished from possibility of reverter, 161.
incidents of, 227.
varieties of, 227.
displacement of, 228.
expectant on lease, 227.
old, 214, 325, 383.
purchase of, 571.

Reversionary interests,
sale of, 242.

Reverter,
possibility of, 161, 229.
note of, on register, 553.

Revision of statute law, 38 n.

Revival,
of Act, 47.
will, 417.

Revocable licence, 151.

Revocation,
of a will, 413.
uses, 386, 387.

Ridings, 88.

Right of action, 358.

Right of common, 457 *et seq*, 492.

Right of entry, 225, 226, 239, 330, 356.

Right of possession, 225.

Right of re-entry, 214, 215, 351, 508, 525, 540.

Right of way, 465, 540.

Rights, 95.

Rights and wrongs,
personal, 95.
private, 95.
public, 95.

Rights of property, 95.

Riot,
compensation for, 88.

River,
bounding two estates, 315.

Rolle's Abridgment, 30.

Roman Catholics,
charities of, 320 n.

Roman law, 3, 16, 25.

Root,
of descent, 280, 296, 297.
title, 501.

Royal,
assent, 41, 72.
domains, 433, 434.
forests, 472, 473.
grants, 430 *et seq.*

Rule, 11.

Rule in Shelley's case, 240, 241, 272.

Rule of perpetuities, 389, 390, 426, 427.

Running with land,
covenants, 345, 361, 499.

Rural deanery, 80.

S.

Safe custody,
of deeds, 499.

Sale,
of lands given to charity, 323, 324.
under Settled Estates Act, (1877), 539 *et seq.*
under Settled Land Acts, (1887—1890), 518 *et seq.*

Sale of property,
by mortgagee, 221.
practice on, 340 n, 501.

Sanctions,
vindicatory, compel and oblige, 15.
remuneratory, persuade and allure, 15.

Sans nombre,
common, 461.

Sark, island of, 66.

Sarum, council of, 119.

Satisfied terms, 510, 512.

Scheme, improvement, 532.

Schools of law, 8.

Scintilla juris, 266.

Scire facias, 433.

Scotland,
Act of union, 53.
church of, 55.
law of, 53 n, 56, 56 n.
secretary for, 57.
universities of, 55.

Scutage, 131, 132.

Sea-frontagers, 491.

Seal,
antiquity of, 340.
on deed, 346.
great, 430, 431.
privy, 430, 431.

Searches, 507, 559, 560.

Sea-shore, 79.

Seck, rent, 479.

Secondary use, 385.
conveyances, 364.

Secret use, 263.

Secretary of State,
colonial, 69.
for India, 77.
Scotland, 57.

Secundum formam doni, 162.

Security, personal, 96.

Se defendendo, 97.

See, Bishop's, 80, 86.

Seigniory, 139.

Seised or possessed, 187, 188, 265.

Scisin,
in deed, 176, 180, 297.
law, 176, 297.
livery of, 152, 355.
recovery of, 399.
unity of, 494.
of rent, 485.

Seisina facit stipitem, 283, 285, 485.

Seizure *quousque*, 446.

Self-defence, 97.

Self-preservation, 104.

Separate estate,
of married woman, 412.

Sepoy revolt, 76.

Serjeant-at-law, 6.

Serjeanty,
grand, 131.
petit, 137.

Services.
free or base, 122.
certain or uncertain, 122.
in knight's tenure, 124.
socage tenure, 133.
villein socage, 140.
antient demesne, 146.
divisible, 256.
indivisible, 256.

Serving the use, 380.

Session, great,
courts of, in Wales, 52, 167, 171.

Settled Estates Act (1877), 539 *et seq.*

Settled land, 516.
title to, registration of, 546.

Settled Land Act (1882), 167, 171, 330, 442, 516, 519.

Settled Land Act (1884), 516, 522, 539.

Settled Land Act (1890), 193, 516, 521, 522, 524, 526, 529.

Settled legacy, duty on, 575.

Settlement,
family, 239, 538.
protector of the, 167, 403.
strict, 239, 538.
under Settled Land Acts, 516.
compound, 516, 520.

Settlement—*cont.*
trader's, 538.
estate duty, 574.

Settlor, 499.

Several fishery, 475.

Severance,
of jointure, 247, 249.
reversion, 215, 508.

Shack, common of, 459.

Shares in company, 210.

Shelley's case, rule in, 240, 241, 272.

Sheppard's Touchstone, 30.

Sheriff,
nature of office, 88, 89.

Shifting use, 385.

Shore of the sea, 79.

Short Titles Act, 39 n.

Sign Manual, 430, 431.

Signet, privy, 430, 431.

Signing,
deeds, 346, 347.
wills, 413, 414.

Simple contract debts,
of deceased, 300, 301.

Sites for schools, 319, 319 n., 333 n.

"Six months," 189.

Slavery, 74.
abolition of, 74.

Slave trade,
repression of, 73, 74.

Small estates, 575.

Small holdings, 558.

Smithfield market, 471.

Socage,
meaning of the term, 134 n.
free, 133.
villein, 134.
devise of, 411.

Soil, common in, 461.

Solicitors Act (Ireland), 63.

Solicitor, vendor's,
receipt of purchase money by, 506.

Sovereign,
grant by, 430 *et seq.*

Special customs, 25, 31.

Special occupant, 313 486.

Special power, 423.

Special tail, 162, 163.

Special vestry, 84.

Specialty debts,
nature of, 298, 299.
no priority in administration of assets, 300.

Spiritual tenure, 149, 150.

Springing use, 384, 385.

Springs of water, 467.

Stallage, 470.

Stamp Acts, 339 n.

Staple, statute, 221.

Statement in lease, 523.

Status, 151.

Statuta,
incerti temporis, 38 n.
nova, 38 n.
vetera, 38 n.

Statute of Uses, 182, 244, 264, 380, 410, 426, 432.

Statute, interpretation of,
general rules for, 40 *et seq.*
particular rules for, 45.

Statute law,
revision of, 38 n.
repeal of, 47.

Statute merchant, 221.

Statute staple, 221.

Statute, varieties of,
public and private, 32.
declaratory, 39, 40.
penal, 40.
remedial, 40.
disabling and enabling, 40.

Statutes,
judicially noticed, 39.
mode of citing, 38 n.
repeal of, 47.
revision of, 38 n.
expiring, 48.

Statutes (modern)
Accumulations, 390, 391.
Assets, 167, 300, 440.
Agricultural Holdings Act (1883), 196, 204.
Agriculture (Board of) Act (1889), 451, 463, 516, 534.
Apportionment Act (1870), 173, 483.
Charitable Uses (1888, 1891), 320, 322, 323.
Contingent Remainders Act (1877), 240, 241, 386.
Conveyancing Act (1881), 157, 215, 218, 274, 345, 359, 367, 380, 388, 481, 486, 496, 512.
(1882), 388, 407, 512, 559.
(1892), 216, 508, 510.
Copyhold Act (1894), 274, 441, 448, 450, 452, 454, 505.
Debts, 167, 300, 440.
De donis conditionalibus, 161.
Dower Act (1834), 40, 180, 183, 273.
Felony Act (1870), 32, 309.
Finance Acts, 563 *et seq.*
Fines and Recoveries Act, 158, 166, 325, 334, 344, 392, 401, 406, 449, 450.
Frauds, Statute of, 153, 192, 193, 273, 299, 313, 347, 356, 360, 363, 368, 371, 378, 413, 415.
Fraudulent Devises, Statute of, 299.
Improvement of Lands Act (1864), 519.
Inclosure Acts, 363, 463.
Infants' Relief (1874), 334.
Inheritance Act, 279, 291, 295, 309, 383, 485.
Interpretation Act (1889), 38, 48, 64, 67, 189, 429.
Intestates' Estates Act (1884), 274, 310.
Judicature Acts, 49, 92, 170, 221, 228, 229.
Judgments, 167, 222 ,440.
Land Charges (Registration and Searches) Act (1888), 479, 544.
Land Transfer Acts (1875, 1897), 274, 301, 434, 544, 574.

Statutes (modern)—*cont.*
Local Government Act (1888), 57, 58, 88, 90, 94, 320, 332.
Local Government (Rural Parishes) Act (1894), 82, 84, 85, 90, 320, 558.
Locke King's Acts (1854, 1867, 1877), 219.
Lord St. Leonards' Act, 214, 216, 296, 303, 387, 478.
Lunacy Act (1890), 446.
Market Gardens, 206.
Married Women's Property Acts, 246, 274, 412.
Mortmain Acts, 322 *et seq.*
Municipal Corporations (1882), 93, 332, 333.
Naturalization Act (1870), 306, 335.
New Wills Act, 157, 313, 411, 415, 419, 423, 444, 449.
Of Uses, 182, 244, 264, 380, 410, 426, 432.
Prescription Act (1832), 24, 35, 467, 487, 491, 494.
Quia Emptores, 130, 154, 328, 342, 548.
Rates (Agricultural), 576.
Real Property (Amendment) (1845), 151, 153, 193, 228, 234, 240, 247, 257, 325, 330, 335, 338, 340, 343, 356, 358, 360, 362, 369, 370, 378, 380, 389.
Real Property Limitation Acts (1833, 1874), 219, 226, 248, 344, 356, 397.
Rents, 329, 369, 481,
Settled Estates Act (1877), 167, 171, 539.
Settled Land Act (1882), 167, 171, 330. 442, 516, 529.
Settled Land Act (1884), 516, 522, 539.
Settled Land Act (1887), 516.
Settled Land Act (1889), 516, 528.
Settled Land Act (1890), 193, 516, 521, 522, 526, 529.
Small Holdings, 320, 558.
Trustee Act (1888), 506.
Trustee Act (1893), 270, 271, 309, 406, 505, 507, 516.
Vendor and Purchaser Act (1874), 220, 274, 501, 543.
Voluntary Conveyances (1893), 350.
Yorkshire Registries Acts, 190, 542, 543.

Statutory declaration,
on a sale of registered land, 556.

Statutory mortgage, 499, 500.

Stint, common without, 461.

Stipes, 283.

Stirpes,
succession per, 289.

Straits Settlements,
Acts relating to, 71 n.

Stranger,
to deed, 340.
fine, 395.

Streams, 467.

Streets, 525, 530.

Streets and gardens,
dedicating land for, 525, 530.

Strict settlement, 239, 538.

Study of the Law, 1.

Sturges Bourne's Act, 83.

Sub-headings,
of statute, 45.

Subinfeudation, 130, 154.

Subscription,
to a deed, 346, 347.
will, 425.

Subsequent condition, 212, 216.

Subsequent purchasers, 350.

Succession,
per stirpes, 289.

Succession duty, 564 *et seq.*
double, 566.
additional, 568.
rates of, 565.

Successor, 564.

Successors, 316.

Sufferance,
estate at, 198.

Suffragan bishops, 80 n.

Sunset,
payment before, 482.

Superstitious uses, 320.

Sur cognizance,
de droit come ceo, &c., 394.
de droit tantum, 394, 395.

Sur concessit fine, 395.

Sur don, grant, et render, fine, 395.

Surrender,
nature of, 368.
may be by operation of law, 368.
express, must be by deed, 368.
of renewable leases, 369, 370.
under Settled Land Acts, 518, 531.
of part of demised premises, 484.
copyhold, 442, 449.
conditional, 447.
to the use of will, 448.
bar entail, 450.
pass copyholds of married woman, 449, 450.
does not affect under-leases, 325.

Surrenderee,
and surrenderor, 443.

Survey of Great Britain,
ordnance, 53 n., 550.
geological, 53 n.

Survivorship, 246, 250, 254.

Survivorship, benefit of, 254.

Suspension of *Habeas Corpus* Act, 102.

Symbolical delivery, 355.

Syngrapha, 338.

T.

Tails, 160 *et seq.*

Taltarum's Case, 165.

Tasmania,
Acts relating to, 71 n.

Taxation,
of colonies, 69.

Tenant,
at sufferance, 198.
will, 196.
by copy of court roll, 143, 435.
elegit, 223.
statute merchant, 222.
statute staple, 222.

Tenant—*cont.*
by the curtesy, 175.
copyhold, 455.
for life, 168, 174, 516.
years, 194.
from year to year, 194.
in common, 254.
dower, 178.
fee, 154.
frankalmoign, 149.
tail, 160.
after possibility of issue extinct, 174, 400.
ex provisione viri, 400.
joint, 243.
pur autre vie, 168.

Tenant for life,
under Settled Land Acts, 516.

Tenant right, 205, 218.

Tenants *in capite*, 121, 128.

Tenement, 111, 113.

Tenements, varieties of,
frank tenements, 152.
villein tenements, 123, 152.

Tenendum,
of a deed, 341.

Tenures,
varieties of, 113, 122.
free or base, 122.
certain or uncertain, 122.
perfect and imperfect, 118.
enumeration of particular,
by cornage, 131.
divine service, 150.
copyhold, 139.
customary, 146.
in burgage, 138.
gavelkind, 138.
frankalmoign, 149.
grand serjeanty, 131.
petit serjeanty, 137.
socage, 133.
villein, 134.

Termor, 191.

Term or time, 192.

Term of years, 188.
enlargement of, into fee simple, 512.
satisfied, 510, 511.

Terms attendant,
on the inheritance, 511.

Terms, long, 190, 191.
cesser of, 510.
enlargement into fee simple, 512.
extinguishment of, 511.

Territorial divisions,
of England, 79.

Territorial Waters Jurisdiction Act (1878), 79 n.

Testator,
capacity to be, 410 *et seq.*

The New Wills Act, 157, 313, 411, 415, 419, 423, 444, 449.

Thellusson's Case, 390.

Theobald, 3.

Things,
real, 187, 188.
personal, *ib.*

Threats, 97.

Three miles limit, 79.

Timber,
on copyholds, 437.

Time,
computation of, 188.

Tithes, 80, 81.

Tithing, 85.

Title,
absolute, 546, 549, 551.
indefeasible, 560.
qualified, 546, 550, 552.
possessory, 546, 550.
judicial, 560.
abstract of, 501, 556, 557.
by act of law, 277.
party, 277.
descent, 278.
escheat, 117, 302.
purchase, 277.
declaration of, 560.
in general, 276.
of nobility, 288.
statute, 45.
private Acts, 429.
registered, 548 *et seq.*
unity of, 244.

Title, abstract of, 501.

Title deeds,
go with realty, 207.
custody of, 499, 505.
production of, 499.
inspection of, 515 n.

Titles of honour, 294.

Tolls, 469, 470.

Tombstone, 208.

Tortious alienations,
by particular tenants, 324.

Tortious feoffment, 228, 234, 325, 388.

Torture, 99.

Town,
definition of, 86.

Towns, corporate, 86.

Towns being counties, 93.

Trade debts, 299.

Trade fixtures, 203.

Trader's settlement, 538.

Transfer,
of registered land, 554.
charge, 554.
covenants implied in, 554, 555, 557.

Transfer, right of, 107.
of mortgage, 515 n.

Transportation, 103, 103 n.

Treason,
corruption of blood in, 307, 308, 309.
law as to forfeiture for, 306 *et seq.*

Treasury, consent of, 332.

Trinoda necessitas, 149.

Trithing, 88.

Trust, *cestui que*, 268.

Trust estate, 270.
vesting of, 270, 271.
disclaimer of, 336.

Trustee,
attainder of, 272.
bankruptcy of, 272 n.

Trustee—*cont.*
conviction of, 272.
devise to, 418, 419.
under Intestates' Estates Act (1884), 274, 310.
statutory provisions with regard to, 274, 275.
to preserve contingent remainders, 239.

Trustee Act (1888), 506.

Trustee Act (1893), 270, 309, 406, 505, 507, 516.

Trustees of settlement, 521.

Trusts,
active, 267.
contingent remainders in, 272.
curtesy in, 175.
dower in, 273.
escheat of, 310.
executory, 269.
express, 269.
implied, 269.
passive, 267.
resulting, 269.
to attend inheritance, 510, 512.
preserve contingent remainders, 239.

Turbary,
common of, 461.

Twelvemonth, 189.

U.

Ultimæ necessitatis, senatus consultum, 102.

Unadmitted surrenderee, 444.
or devisee, 444.

Uncertain services, 122.

Underground water, 467.

Underlessee,
emblements of, 172.
on surrender of lease, 325, 369, 370.
distinguished from assignee of lease, 370, 371.

Undertaking as to title-deeds, 499.

Undertakings, public,
shares in, 210.

Union,
with Ireland, 61.
Scotland, 53.

United States of America, 69.

Unity of seisin, 494.

Unity of title, 244.

Universities and colleges,
Estates Acts, 524 n.

University of London, 8.

University, Victoria, 8.

Unreasonable,
bail, 101.
custom, 36.
fine, 438.
toll, 470.

Unregistered dealings,
with registered lands, 554.

Unregistered estates, 551, 553, 557.

Unwritten law, 20 *et seq.*

Usages of trade, 33.

Use, cestui que, 260.

Use upon a use, 266.

Uses,
charitable, 320, 322.
contingent, 234, 272.
curtesy in, 272.
distinguished from trusts, 258.
dower in, 273.
executory, 385.
express, 260, 381.
implied, 381.
resulting, 260, 381.
secondary, 385.
shifting, 384, 385.
springing, 384, 385.
superstitious, 320.
in wills, 426.

Uses, seisin to, 265.

Uses, Statute of,
provisions of, 264.
conveyances under, 374 *et seq.*

Uses to bar dower, 183.

Usque ad medium filum aquæ, 466.

Ut de coronâ, 121, 155.

Ut de honore, 121, 155.

Uterinus frater, 294.

Ut res magis valeat, quam pereat, 352.

V.

Vacarius, 3.

Vadium,
mortuum, 217.
vivum, 217.

Valuable consideration, 350.

Value of marriage, 127, 135.

Value of succession, 565.

Valuers, inclosure, 464.

Vancouver's Island, 71 n.

Van Dieman's Land, 71 n.

Variation of investments, 537.

Varying rent,
mines, 529

Vendor,
covenants by, 345.

Ventre sa mère,
children in, 96, 97.

Verba fortius accipiuntur, 353.

Verba intentioni debent, 351.

Vested remainder, 234.

Vesting.
of legal estate, 274, 554, 574.

Vesting order, 270, 271.
tail barred by, 406.

Vestry, 83.

Vestry clerk, 84.

Vetera statuta, 38 n.

Vicar, 82.

Vicecomes, 88.

Vicinage,
common because of, 459.

Victoria,
Acts relating to colony of, 71 n.

Victoria University, 8.

Vill, 87.

Villein socage, 123, 134.

Villeins,
origin of, 140.
varieties of, 141.
enfranchisement of, 142.
develope into copyholds, 143.

Villenage,
pure, 123.
privileged, 123.
extinction of, 143, 144.

Viner's abridgment, 30.

Visitor, 149, 150.

Vivo vadio,
estate in, 217.

Void,
crown grants, 433.

Void and voidable, 333, 334.

Voluntary deed, 350.

Voluntary grant, 447.

Voluntary enfranchisements, 454.

Voluntary waste, 170.

Vouchee, common, 398.

Voucher to warranty, 399.

W.

Waiver,
of condition, 216.
escheat, 310.
forfeiture, 310.
month's notice, 522.

Wales,
subjugation of, 51.
members for, 52.
courts of, 52.
assizes for, 52.

Wales, Prince of, 51.

Wales, statute of, 51.

Wapentakes, 88.

Wards and liveries,
court of, 126.

Wardship,
in chivalry, 125.
copyholds, 145.
socage, 134.

Warrant,
under sign manual, 431, 432.

Warranty,
collateral, 344.
lineal, 343.
express, 343.
implied, 343.
generally, 342.

Warren, fowls of, 474.

Warren, free, 474.

Waste,
legal, 170.
equitable, 170.
voluntary, 170.
permissive, 170.
under Judicature Acts, 170.
under Settled Land Act, 534.
in copyholds, 437.
by tenant at will, 197.
for years, 193.
for life, 170.
under Settled Land Acts, 534.
impeachment of, 170.

Waste lands,
grant of, 448, 453.
consents to, 448, 453.
inclosure of, 462 *et seq.*

Waste, year, day, and, 308.

Water, 466.

Watercourse, 466, 493, 540.

Way,
rights of, 465, 540.
of necessity, 465.
acquisition of, 493, 540.

Wayleaves, 465, 493, 540.

Week to week,
tenant from, 196.

Weirs, 476.

Wells, underground, 467.

West Indies,
Acts relating to, 71 n., 73, 73 n.

Westminster,
formerly a bishop's see, 87 n.

West-Saxon lage, 22.

White rents, 480.

Whole blood, 293, 295.

Widowhood,
estate during, 169.

Wight, Isle of, 66.

Wilful default, 136.

Will, estates at, 196.

Will, gift by,
to charities, 323.

Will of the lord, 143, 435.

Wills and deeds,
distinctions between, 157.

Wills, statute of,
old, 410.
new, 411 *et seq.*

Wills, 409 *et seq.*

Windward Islands, 71 n.

Witnesses,
to a deed, 348.
will, 413, 414.

Words of inheritance,
not wanted in release, 367.

Writ,
of admeasurement of dower, 181.
close, 430.
of covenant, 393.
elegit, 222, 440.
error, 61.
ne exeat regno, 103.
partition, 248, 253.
right, close, 147.

Writing,
required for leases, 192, 193.
trusts, 273.

Writs and orders,
affecting land, registry of, 544.

Written conveyances, 354.

Written laws,
are statutes, 38.

Wrongs, 96.

Wrongful alienation,
by particular tenants, 324

Y

Year 188.

Year and a day,
in forfeitures, 308.

Year, day, and waste, 308.

Year, tenancies by, 194.

Year to year,
tenancies from, 194.

Year-books, 28.

Yearly tenancy, 194.

Years, estates for, 188.

York,
customs of, 32.

Yorkshire,
registration of deeds in, 543, 544.

Yorkshire Registries Act (1884), 544.

LONDON :
PRINTED BY SHAW AND SONS, FETTER LANE AND CRANE COURT, E.C.

SCHOOL OF LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 851 310 3